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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

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SUPREME COURT, U.S.

No. 76-6547

76-6547.

JESSE BLACK, Petitioner

-vs-

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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No. ____

JESSE BLACK, Petitioner

-vs-

STATE OF OHIO, Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio, entered in the above-entitled case on January 14, 1977.

I. OPINIONS BELOW

The judgment and sentence of the Court of Common Pleas of Richland County, Ohio is not reported. A copy is attached as Appendix A.

The opinion of the Court of Appeals of Richland County, Ohio also is not reported. A copy is attached as Appendix B.

The opinion of the Supreme Court of Ohio, State v. Black, 48 Ohio St.2d 262, 358 N.E.2d 551 (1976), is attached as Appendix C. The judgment and order of the Supreme Court of Ohio, dated January 14, 1977, is attached as Appendix D.

II. JURISDICTION

The date of the judgment of the Supreme Court of Ohio, which this petition seeks to have reversed, is January 14, 1977 (Appendix D).

This Court has jurisdiction to review the judgment of the Supreme Court of Ohio pursuant to 28 U.S.C. §1257(3).

III. QUESTIONS PRESENTED

A. UNDER ANY OF THE CURRENT STANDARDS FOR DETERMINING EFFECTIVE ASSISTANCE OF COUNSEL IN A CRIMINAL CASE, DOES A TRIAL ATTORNEY DEPRIVE HIS CLIENT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HE (1) ADMITS HIS CLIENT'S GUILT DURING OPENING STATEMENT AND CLOSING ARGUMENT (2) INTRODUCES HIS CLIENT'S PRIOR FELONY RECORD INTO EVIDENCE AT THE CONCLUSION OF THE TRIAL, EVEN THOUGH THE RECORD WAS INADMISSIBLE AS THE CLIENT DID NOT TESTIFY (3) FAILS TO RECOGNIZE A FOURTH AMENDMENT VIOLATION WHICH COULD HAVE BARRED THE ADMISSION OF HIS CLIENT'S CONFESSIONS (4) FAILS TO OBJECT TO PREJUDICIAL, INADMISSIBLE HEARSAY AND OPINION TESTIMONY OF PROSECUTION WITNESSES (5) BRINGS OUT PREVIOUSLY UNRELATED AND EXTREMELY DAMAGING EVIDENCE DURING CROSS-EXAMINATION OF PROSECUTION WITNESSES (6) NEVER HAS HIS CLIENT BEEN EVALUATED BY A DEFENSE EXPERT TO DETERMINE HIS COMPETENCY TO STAND TRIAL, SANITY OR, FOR THE PRESENCE OF A STATUTORY MITIGATING FACTOR WHICH WOULD HAVE PRECLUDED THE DEATH PENALTY, THOUGH THE CLIENT HAD BEEN DETERMINED TO BE MENTALLY DEFICIENT BY A COURT-APPOINTED PSYCHIATRIST, AND (7) DEMONSTRATES A GENERAL UNAWARENESS OF PRETRIAL, TRIAL AND POST-TRIAL PROCEDURES GOVERNING TRIAL OF CRIMINAL CASES IN OHIO?

B. WHETHER OHIO REVISED CODE SECTIONS 2929.03 (E) AND 2929.04(B) VIOLATE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY PLACING ON THE DEFENDANT THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE SHOULD NOT BE EXECUTED.

C. WHETHER OHIO'S DEATH PENALTY SCHEME IS CONSTITUTIONAL CONSIDERING THE ILLUSORY NATURE OF SOME OF THE SPECIFIED MITIGATING FACTORS, THE NARROW SCOPE OF WHAT REMAINS AND THE IRRELEVANCE OF NON-SPECIFIED FACTORS AND THE FACT THAT OHIO DOES NOT HAVE A SYSTEM OF APPELLATE REVIEW OF ALL DEATH SENTENCES WHICH INCLUDES A COMPARISON OF CASE BY CASE FACTS TO INSURE THAT A DEATH SENTENCE IN A PARTICULAR CASE IS WARRANTED?

D. WHETHER THE STATE HAS ESTABLISHED ITS BURDEN OF PROVING A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER BY THE DEFENDANT OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, PRIOR TO SECURING A CONFESSION IN LIGHT OF NUMEROUS ARRESTS, LENGTHY INTERROGATORIES, PERSISTENT REFUSALS BY THE DEFENDANT TO SIGN A RIGHTS WAIVER FORM OR MAKE A STATEMENT, AND THE DENIAL OF DEFENDANT'S REQUEST TO SPEAK WITH HIS ATTORNEY?

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS

A. This case involves the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. This case also involves the following provisions of Ohio law, the text of which is set forth verbatim in Appendix E:

(1) Ohio Revised Code, Section 2903.01 Aggravated Murder; Title 29, Page's Ohio Revised Code, Page 15.

(2) Ohio Revised Code, Section 2903.02 Murder; Title 29, Page's Ohio Revised Code, Page 20.

(3) Ohio Revised Code, Section 2903.03 Voluntary Manslaughter; Title 29, Page's Ohio Revised Code, Page 23.

(4) Ohio Revised Code, Section 2903.04 Involuntary Manslaughter; Title 29 Page's Ohio Revised Code, Page 23.

(5) Ohio Revised Code, Section 2923.03 Complicity; Title 29, Page's Ohio Revised Code, Page 134.

(6) Ohio Revised Code, Section 2929.02 Penalties For Murder; Title 29, Page's Ohio Revised Code, Page 152.

(7) Ohio Revised Code, Section 2929.03 Imposing Sentence For A Capital Offense; Title 29, Page's Ohio Revised Code, Page 153.

(8) Ohio Revised Code, Section 2929.04 Criteria For Imposing Death or Imprisonment for A Capital Offense; Title 29, Page's Ohio Revised Code, Page 154.

V. STATEMENT OF THE CASE

Petitioner, Jesse Black, was tried in the Common Pleas Court of Richland County and found guilty of two counts of aggravated murder in May of 1974. On July 8, 1974 petitioner, a mentally retarded black, with an IQ of 68, was sentenced to death.

A. The Numerous Arrests and Interrogations

Petitioner's conviction stemmed from the January 21, 1974 shootings of Olga Laderman and Robert Staples. The Laderman shooting occurred at approximately 4:00 P.M. at the Bel-Aire Motel, and the Staples shooting occurred at approximately 6P.M. at the Staples Beer Dock, both in Richland County, Ohio.

Petitioner, Jesse Black, was arrested on January 22, 1974 as a result of the "stake-out" of a red Mercury Cougar automobile, owned by his girlfriend and tied to the shootings by statements of witnesses as well as by an anonymous phone call to the police. This arrest took place at 8:13 A.M. (Mot. 104).[1/] After arresting officers conducted a search of the automobile, Jesse was taken to police headquarters (Tr. #1, 106).

Petitioner was held in custody until 5:30 P.M. on January 22 (Mot. 106). During this time period Jesse appeared in a lineup, at approximately 11:00 A.M. (Mot. 52; Tr. #2, 439) and a shoe showup (Mot. 53, Tr. #2, 443), took a polygraph test, at 4:13 P.M. (Mot. 55; Tr. #2, 444), and underwent three hours and twenty minutes of questioning, from 1:20 to 4:40 P.M. (Tr. #2, 487). No identification of the petitioner was made (Mot. 52, 54; Tr. #2, 442-3), and petitioner denied involvement in both shootings (Tr. #2, 487). Jesse was also fingerprinted and photographed during his approximately nine and one half hours in custody (Tr. #2, 446).

Jesse was arrested for the second time on January 28, 1974 at 6:14 P.M. (Mot. 106). This time he was held and interrogated for almost two days, his release not coming until January 30 at 9:20 A.M. (Mot. 106). Police questioned him intermittently during this period with respect to the two shootings (Mot. 117-8). One such interrogation took place from approximately 9:00 to 11:00 P.M. on January 28, during which time petitioner refused to sign a rights waiver card and continually stated "no comment on advice of attorney" (Mot. 61; Tr. #2, 450). Additionally, petitioner informed police officials of the identity of his attorney at this time (Mot. 61).

Petitioner was arrested for the third time on January 31, 1977 at approximately 11:00 P.M. for reckless operation of a motor vehicle (Mot. 118). His attorney went to the police station, and petitioner was released shortly thereafter (Mot. 118). His attorney was given a court appearance date of

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1/ The transcript of this case consists of five volumes, as follows: Motion to Suppress, hereinafter Mot.; Voir Dire, hereinafter V.; Trial (2 volumes), hereinafter Tr. #1,2; and Mitigation Hearing, hereinafter Mitig.

February 5, of which he neglected to advise Jesse (Mot. 119). Having not been advised of the date for his court appearance, neither Jesse nor his counsel appeared on February 5. Consequently, a bench warrant for Jesse's arrest was issued on February 5 (Mot. 119). On February 6 petitioner appeared in court with counsel, and the bench warrant was set aside (Mot. 119; Mot. Defense Exhibit #1).

Pursuant to the February 5 bench warrant, which had been set aside on February 6, police arrested Jesse for the fourth time on February 11, 1977 at 10:12 A.M. (Mot. 106). During the course of this arrest police officers discovered a roach (cigarette butt of marijuana) in petitioner's coat pocket and subsequently charged him with possession of marijuana (Mot. 120).

Twelve minutes later, at 10:24 A.M., police officers began interrogating Jesse about the January 21 shootings (Mot. 37). The interrogating officer, Charles Hriesik, read the petitioner his rights from a card, but he refused to sign the waiver portion of the card and refused to make any statement about either shooting (Mot. 37). After one and a half hours of questioning, petitioner was taken from the lineup room to a cell. (Mot. 39).

Less than two hours later, at 1:45 P.M., the same officer, Hriesik, had petitioner brought back from his cell to the lineup room for further questioning (Mot. 39). After being advised of his rights, Jesse again refused to sign a rights waiver and refused to make a statement (Mot. 39, 62, 75). Upon request he was permitted to phone a friend, his attorney and his father, but was unable to reach any of them (Mot. 40, 63). More specifically, he could not reach any of these people, but did reach his lawyer's office, as opposed to his lawyer himself, and he continued to refuse to give any statement to the police (Mot. 82).

Having had no success obtaining a statement from petitioner on February 11, investigating officers resumed questioning on the morning of February 12 at 8:15 A.M. (Mot. 4). Two officers questioned Jesse until 8:40 A.M., during which time he again refused to sign a rights waiver and refused to make a statement (Mot. 5-6, 21-2; Tr. #2, 485). According to one of

the officers, Jesse might have asked to contact his lawyer and might have stated that his lawyer told him to make no statement during the course of this interrogation (Mot. 22-3).

Having not again succeeded in attempting to obtain a rights waiver from Jesse, police next brought in one of his friends, Jimmie Eatmon, to confront him with what Eatmon knew of Jesse's involvement in the shootings (Mot. 7, 41). Eatmon, however, himself refused to make a statement and asked to call his attorney (Mot. 8, 41; Tr. #2, 424). Eatmon left this small interview room to phone his attorney. Shortly thereafter, Eatmon returned to this small interview room and told Jesse that he had told police what he knew about the shootings and would testify to what he knew in court (Mot. 28, 41). As with the earlier requests of the police that he waive his rights and make a statement, petitioner made no statement in response to the remarks of Eatmon (Mot. 29, 42). Jesse was thereupon returned to his cell, at approximately 9:15 A.M. (Mot. 29, 42).

At 10:15 A.M. these same two officers, Butler and Hriesik, once again removed petitioner from his cell (Mot. 8, 30, 42; Tr. #2, 425) and took him to the lineup room. Instead of advising him of his rights, as the police had done so many times previously, Officer Hriesik simply asked Jesse if he understood his rights (Mot. 8, 30, 42; Tr. #2, 425). Jesse said that he did. Hriesik then advised petitioner that "he should straighten this matter out" (Mot. 8, 30, 42; Tr. #2, 425-6). In response to Hriesik's invitation, unaccompanied by Miranda warnings or request to waive his rights, Jesse asked to talk to his father, his girlfriend and his attorney (Mot. 30). The officers did not permit him to phone his attorney, and on the heels of this refusal, Jesse admitted involvement in the shootings (Mot. 30, 42). Specifically, Officer Butler testified to the following scenario:

> Q. Now then in your presence Jesse was advised he should straighten this matter out. That would be something Lieutenant Hriesik said to him?
> A. That is correct.
> Q. He immediately said before he said anything he wanted to talk to his father and girl friend is that correct on page two?

A. Yes, that is what he said.
Q. Now was he permitted at that time to call his father or his girlfriend?
A. No not at that very moment.
Q. Did he mention he wanted to talk to his lawyer?
A. I believe he did yes sir.
Q. Was he permitted to contact his lawyer at that time?
A. At that time.
Q. That would be myself.
A. No.

(Mot. 30)

After petitioner made incriminating admissions, to the effect that he had accidentally shot Olga Laderman when she grabbed his gun and had driven Eatmon to the beer dock where Eatmon shot Robert Staples (Mot. 9), Hriesik asked him if he would repeat the same story to Major O'Neil (Mot. 31, 42; Tr. #2, 426). Jesse said he would, and Major O'Neil was brought to the interrogation room (Mot. 10, 31, 42). At 10:20 A.M., the Major advised Officer Butler to read Jesse a rights card, which he did (Mot. 31, 43; Tr. #2, 426-7). Jesse again refused to sign the rights waiver portion of the rights card, but repeated the same incriminating admissions to Major O'Neil (Mot. 10-12, 31, 43-4; Tr. #2, 427-8).

Having told the police that he had held the gun when it fired and killed Olga Laderman, Jesse, at the request of Officer Hriesik, assented to a second confrontation with Eatmon (Mot. 32-3, 45). At this second confrontation, petitioner asserted that Eatmon had driven him to the Bel-Air Motel, where the Laderman shooting occurred, and that he had driven Eatmon to the beer dock, where Eatmon shot and robbed Robert Staples (Mot. 14, 45-6; Tr. #2, 431-2).

Shortly thereafter, at 11:10 A.M. on February 12, 1977, more than 24 hours after his arrest on the invalid bench warrant and incidental marijuana charge, petitioner was taken to court for the setting of bond on the marijuana charge (Mot. 26, 46; Tr. #2, 461). Bond was originally set at $1,000.00, but shortly thereafter was raised to $5,000.00 (Mot. 26). Upon his return to the jail, Jesse was visited by his father, whom he told that he had confessed just to get the police off his back (Mot. 47; Tr. #2, 433, 462).

The next day, February 13, 1974, at approximately 4:05 P.M., police took petitioner to Major O'Neil's office for further questioning (Mot. 75). Four officers, O'Neil, Goldsmith, Hriesik and Kraus, were present (Mot. 64; 75-6; Tr. #2, 490,533). At this time Jesse was advised of his rights, and he signed a written waiver thereof (Mot. 76-7; Tr. #2, 490-1, 534). Beginning at 4:55 P.M., these officers questioned Jesse about the Laderman shooting (Mot. 64a, 88), and Officer Hriesik typed all the questions and answers (Mot. 78; Tr. #2, 434). This statement was completed at approximately 6 P.M. (Mot. 64a; Tr.#2, 495), at which time petitioner read and signed it (Mot. 78; Tr. #2, 495). Jesse admitted in this statement that he was holding a gun on Olga Laderman, when she grabbed the gun and it went off (Tr. #2, 493).

A second statement, regarding the Staples shooting, was taken and typed from approximately 6:15 to 7:50 P.M. (Mot. 70, 79; Tr. #2, 495). Jesse read and signed this statement, in which he admitted that he drove Eatmon to the beer dock, whereupon Eatmon shot and robbed Robert Staples (Mot. 80; Tr. #2, 496).

As with the previous questioning sessions, the police admitted they knew petitioner was represented by a particular attorney before they questioned him (Mot. 101; Tr. #2, 507).

A warrant for aggravated murder was issued against the petitioner at 7:10 P.M. on this same date, February 13, 1974 (Mot. 106), and he was arraigned the next day (Tr. #2, 480). On February 19, 1974, Jesse and his counsel, at Jesse's request, met with police officials, at which time he repudiated his earlier statements and named other individuals whom he claimed were responsible for the shootings (Mot. 110; Tr. #2, 481).

B. <u>The Trial</u>

The prosecution's case at trial consisted of testimony which: identified the red Mercury Cougar, owned by petitioner's girlfriend, as being present at the scene of both shootings (Tr. #1, 55, 80, 91, 193, 203); established that the same gun was used in both shootings (Tr. #1, 182-7); and disclosed that

the shots fired from this particular gun caused the deaths of Olga Laderman and Robert Staples (Tr. #1, 29, 140).

The prosecution presented petitioner's girlfriend, June Smith, who testified that Jesse had admitted involvement with both robbery-shootings to her (Tr. #1, 246, 250, 261, 305). She further testified that she told this to the police only after the chief prosecutor told her that they would "go easy" on her if she would make a statement, and after a policeman or prosecutor suggested that she would be separated from her baby daughter unless she "talked" to them (Tr. #1, 309-10).

The prosecution also presented Jimmie Eatmon and Sam Horn, both who testified that petitioner admitted shooting Olga Laderman (Tr. #1, 318, 349; Tr. #2, 394). Eatmon further testified, along with one of his neighbors, Rodic Rutledge, that Jesse borrowed a razor from him between 2:30 and 4:30 P.M. on the day of the shootings and shaved off his (petitioner's) moustache and beard (Tr. #1, 318, 349, 351; Tr. #2, 383). On cross-examination Eatmon admitted that he had been booked on suspicion of murder and held in custody for five days (Tr. #1, 360), but that he was never charged with an offense.

The prosecution next presented Officer Hriesik, who testified that the petitioner had confessed that he was robbing Olga Laderman, when she grabbed his gun and it fired (Tr. #2, 426, 428, 431-2), and that he had driven Eatmon to the beer dock, where Eatmon robbed and shot Robert Staples (Tr. #2, 434). Subsequently, Officer Kraus testified that he was present with the petitioner on February 13, when he admitted the above-described involvement with the two shootings and signed two statements to that effect (Tr. #2, 491).

Major O'Neil then related to the jury that petitioner had confessed to this same involvement with the shootings to him on February 12 (Tr. #2, 515).

Finally, the prosecution presented Major Goldsmith, who testified that he, too, was present in the room on February 13, when Jesse admitted involvement and signed two statements to that effect (Tr. #2, 535). The two statements were subsequently admitted into evidence (Tr. #2, 540).

The defense thereupon presented evidence that Robert Staples (who was shot after the petitioner had allegedly shaved off his moustache and beard) described his assailant as having a moustache (Tr. #2, 552). The defense further offered reports which contained the results of tests conducted by the prosecution which had proven negative with respect to the defendant, as follows: (1) Exhibit 12 - presence of gunpowder residue; (2) Exhibit 13, 14 and 15 - palm and fingerprint comparison; (3) Exhibit 16 - oil comparison; (4) Exhibit 17 - clothing examination. (Tr. #2, 544).

Defendant, upon the advice of his counsel, did not testify (Tr. #2, 575-6).

After offering incriminating exhibits into evidence, such as the defendant's prior criminal record, which included a breaking and entering and armed robbery conviction (Tr. #2, 577; Mitig., 32), defense counsel rested (Tr. #2, 581). 2/ The prosecution offered no rebuttal (Tr. #2, 581), and thereupon presented its closing argument (Tr. #2, 584-97).

2/ This was not the first, nor the last, reflection of appointed trial counsel's lack of expertise in the trial of a criminal case. Petitioner directs the Court to the following portions of the record:

(1) Mot. 1-4 (Defense counsel unfamiliar with rules of criminal discovery);
(2) Mot. 1-157 (Counsel does not elicit evidence, nor posit argument, regarding the fact that petitioner's confessions were a fruit of his illegal arrest, pursuant to a bench warant which had been set aside);
(3) All transcripts (Petitioner was never evaluated by a defense expert, to determine competency, insanity, or whether petitioner's conduct was primarily the product of his mental deficiency);
(4) Tr. #1, 87-93, 299, 360-73 (Counsel brings out previously unrelated and extremely damaging evidence during cross-examination of prosecution witnesses);
(5) Tr. #2, 421, 529-30 (Counsel fails to object to extremely damaging, inadmissible hearsay testimony and opening testimony of prosecution witnesses);
(6) Tr. #2, 540, 578 (Counsel fails to present a motion for judgmentoof acquittal, both at the close of the prosecution's case and at the close of the defense);
(7) Tr. #1, 8; Tr. #2, 617-20 (Counsel admits petitioner's guilt during his opening statement and closing argument, respectively);
(8) Mitig. 3-4 (Defense counsel does not realize he has burden of proof at mitigation hearing); and
(9) All transcripts (Counsel never argued against the constitutionality of the death penalty).

Although defense counsel had amazingly admitted that petitioner was involved at least as an accomplice in both shootings during his opening statement, (Tr. #1, 8) he even more amazingly admitted that Jesse shot and killed Olga Laderman (Tr. #2, 617), and that he was at least an accomplice in the robbery-killing of Robert Staples (Tr. #2, 620), during the course of his closing argument. More specifically, defense counsel argued as follows:

> Basically what he tells you about the Olga Laderman death and he tells that in the alleged oral statement he made prior to the written statement is that he was about to leave that motel and she grabbed for the gun and it went off, it was an accident. All right it was an accident. There was no intent. He didn't want to shoot that woman. He didn't want to kill anybody. To that extent it is completely unplanned, unthought of and that it was indeed a terrible thing that happened and he regretted it very much but it was none of the cold blood business or anything of that kind involved in that.
>
> (Tr. #2, 617)
>
> * * *
>
> What I am suggesting to you basically is this. Jesse had some involvement in these things if nothing else. It is his gun and he was in the car but he had no involvement than that. He had no involvement in both of them than that and he probably is an accomplice or whatever you want to call it. I am further suggesting to you that this man's statement and this type of evidence and on this evidence and in the absence of anybody else being in any way charged or implicated, although the information is abundant, that he should not be found guilty of aggravated murder. My own belief is either as accomplice or in the Laderman case directly on his own statement if you believe it, that he would be guilty of homicide of killing while perpetrating or committing felony and I would think that if you feel constrained because two deaths are involved and because of his involvement here if you in other words can find enough evidence beyond reasonable doubt as the court will define that to convict this man of anything then I would think your consideration would be given to that finding, that is that he was either directly or indirectly involved in killing while a felony was being committed.
>
> I don't know if Jesse Black would be satisfied with a verdict of that kind, I am sure he would be because the state of the evidence or lack of it but I do believe that if you find any involvement beyond reasonable doubt in this case that would be the nature and extent of it.
>
> (Tr. #2, 619-20)

C. The Mitigation Hearing

Subsequent to petitioner's conviction, the trial court held a hearing in order to determine whether to sentence him to death or to life imprisonment. The defense presented no evidence at this hearing, but instead merely cross-examined the neuropsychiatrist, whom the court had appointed to evaluate petitioner (Mitig. 6, 43).

This neuropsychiatrist, Walter Massie, a consultant for the Ohio Department of Correction (Mitig. 12), testified that petitioner was mentally deficient (Mitig. 29, 34-5). He stated that Jesse had an overall IQ of 68, which placed him in the category of borderline mental retardation (Mitig. 24). Dr. Massie testified that Jesse scored very low in block design. He related that such a score was frequently an indication of organic brain snydrome, a physical disorder of the brain itself (Mitig. 24).

Dr. Massie characterized Jesse's mental deficiency as follows:

> I feel it was direct reflection, his judgment was direct reflection of his mental deficiency, his inability to realize the serious situation he was in was related to his lack of ability to synchronize this information.
> (Mitig. 29)

Stated briefly, the neuropsychiatrist concluded that Jesse was mentally retarded, which, in his professional opinion, was the equivalent of mental deficiency. (Mitig. 35).

When asked whether in his opinion Jesse's involvement in the shootings was primarily the product of his mental deficiency, Dr. Massie stated he could not form an opinion (Mitig. 35, 42). Although he could form no opinion as to whether Jesse's conduct was primarily the product of his mental deficiency, Dr. Massie stated that "the mental deficiency of Jesse Black would be a factor in his criminal activities." (Mitig. 42).

Neither the defense nor the prosecution presented any evidence (Mitig. 44-5). Defense counsel presented no argument on behalf of his client (Mitig. 46). The court then asked the petitioner if he had anything to say, to which he responded that he "didn't kill them." The court thereupon sentenced Jesse to

death (Mitig. 47).

D. Federal Question Raised

The denial of petitioner's Sixth Amendment right to counsel by virtue of trial counsel's ineffective assistance was raised by way of assignment of error in both the Richland County Court of Appeals and the Ohio Supreme Court. The assignment of error was overruled by both Courts.

The constitutional validity of the Ohio death penalty scheme was raised by assignment of error in both the Richland County Court of Appeals and the Ohio Supreme Court. Both courts overruling that assignment of error.

The constitutional validity of petitioner's inculpatory statements was first raised in the trial court by a motion to suppress, which was overruled. (Mot. 156). The issue was preserved by assignment of error in both the Richland County Court of Appeals and the Ohio Supreme Court. Both Courts overruled that assignment of error.

VI. REASONS FOR GRANTING THE WRIT

A. UNDER ANY OF THE CURRENT STANDARDS FOR DETERMINING EFFECTIVE ASSISTANCE OF COUNSEL IN A CRIMINAL CASE, A TRIAL ATTORNEY DEPRIVES HIS CLIENT OF HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE HE (1) ADMITS HIS CLIENT'S GUILT DURING OPENING STATEMENT AND CLOSING ARGUMENT (2) INTRODUCES HIS CLIENT'S PRIOR FELONY RECORD INTO EVIDENCE AT THE CONCLUSION OF THE TRIAL, EVEN THOUGH THE RECORD WAS INADMISSIBLE AS THE CLIENT DID NOT TESTIFY (3) FAILS TO RECOGNIZE A FOURTH AMENDMENT VIOLATION WHICH COULD HAVE BARRED THE ADMISSION OF HIS CLIENT'S CONFESSIONS (4) FAILS TO OBJECT TO PREJUDICIAL, INADMISSIBLE HEARSAY AND OPINION TESTIMONY OF PROSECUTION WITNESSES (5) BRINGS OUT PREVIOUSLY UNRELATED AND EXTREMELY DAMAGING EVIDENCE DURING CROSS-EXAMINATION OF PROSECUTION WITNESSES (6) NEVER HAS HIS CLIENT EVALUATED BY A DEFENSE EXPERT TO DETERMINE HIS COMPETENCY TO STAND TRIAL, SANITY OR, FOR THE PRESENCE OF A STATUTORY MITIGATING FACTOR WHICH WOULD HAVE PRECLUDED THE DEATH PENALTY, THOUGH THE CLIENT HAD BEEN DETERMINED TO BE MENTALLY DEFICIENT BY A COURT-APPOINTED PSYCHIATRIST, AND (7) DEMONSTRATES A GENERAL UNAWARENESS OF PRETRIAL, TRIAL AND POST-TRIAL PROCEDURES GOVERNING TRIAL OF CRIMINAL CASES IN OHIO.

To date, no generally accepted standard has been developed in the area of ineffective assistance of counsel by which to measure the conduct of criminal defense attorneys. Such fact is reflected in Cond. Ineffective Assistance of Counsel-Standards

and Remedies, 41 Mo. L.R. 483 (1976), wherein the author sets forth the following numerous, divergent standards which have been adopted by the lower courts: farce, sham or mockery; [3] counsel reasonably likely and rendering reasonably effective assistance; [4] counsel's performance at the normal level of competency; [5] performance meeting the guidelines provided in the American Bar Association Standards Relating to the Administration of Criminal Justice; [6] fair trial and substantial justice; [7] and numerous variations of those standards described above. [8]

Similarly, the courts have disagreed on the question of who must shoulder the burden of establishing prejudice, or conversely, the lack of prejudice flowing from the constitutionally inadequate representation. For example, the Fourth and D.C. Circuit Courts of Appeals place the burden of proof on the prosecution, Coles v. Peyton, 389 F.2d 224 (4th Cir. 1968) and United States v. DeCoster, 487 F.2d 1197 (D.C. Cir. 1973) [9] whereas the Third and Eighth Circuits place the burden on the defendant, Green v. Rundle, 434 F.2d 1112 (3rd Cir. 1970) and McQueen v. Swenson, 498 F.2d 207 (8th Cir. 1974).

3/ Brown v. Beto, 377 F.2d 950 (5th Cir. 1967).

4/ McKenna v. Ellis, 280 F.2d 592 (5th Cir. 1960); Beasley v. United States, 491 F.2d 687 (6th Cir. 1974); United States v. Elkanis, 528 F.2d 236 (9th Cir. 1975); People v. Strawder, 34 Cal. App. 3d 370, 108 Cal. Rptr. 901 (1973).

5/ Moore v. United States, 432 F.2d 730 (3rd Cir. 1970); Jackson v. Warden, Nevada State Prison, 537 P.2d 473 (Nev. 1975); State v. Leadinghorse, 192 Neb. 485, 222 N.W.2d 573 (1974); State v. Thomas, 203 S.E.2d 445 (W.Va. 1974).

6/ Coles v. Peyton, 389 F.2d 224 (4th Cir., cert. denied, 303 U. S. 849 (1968); United States v. DeCoster, 487 F.2d 1197 (D.C.Cir. 1973); State v. Harper, 57 Wis.2d 543, 205 N.W. 2d 1 (1973).

7/ State v. Hester, 45 Ohio St.2d 71, 341 N.E.2d 304 (1976).

8/ See, e.g., Diggs v. Welch, 148 F.2d 667 (D.C.Cir.), cert. denied, 325 U.S. 889 (1945); Jones v. Huff, 152 F.2d 14 (D.C. Cir. 1945); Lunce v. Overlade, 244 F.2d 108 (7th Cir. 1957).

9/ See, United States v. DeCoster II, decided Oct. 19, 1976, which is discussed at 20 Cr.L.2080, Oct. 27, 1976, in which D.C.Circuit reaffirms its position.

Petitioner submits that under any of these standards, and irrespective of who has the burden of proof, he was prejudiced by the gross deprivation of his Sixth Amendment right to effective assistance of counsel, to which he is entitled as a state defendant under the Sixth and Fourteenth Amendment to the U.S. Const. Avery v. Alabama, 308 U.S. 444 (1940). As a result of the ineffective assistance rendered in this case, which is summarized in the following paragraphs, petitioner is entitled to a new trial.

(a) Trial counsel's admission of petitioner's guilt.

Trial counsel's most blatant mistake at trial was his admission of petitioner's guilt, both during opening statement and closing argument. He told the jury that petitioner shot and killed Olga Laderman during the course of an armed robbery and that petitioner was at least an accomplice in the robbery-slaying of Robert Staples (Tr. #2, 617, 620; both passages set forth in full Statement of the Case. In Ohio, the conduct admitted by defense counsel constitute the elements of aggravated murder and of the specification which makes the offense punishable by death, because the murder occurred in the course of aggravated (armed) robbery. State v. Lockett, 49 Ohio St.2d 48, 61-3 (1977). Trial counsel's unauthorized admissions to the jury, in and of themselves, constitutes ineffective assistance of counsel. See Matthews v. United States, 449 F.2d 985 (D.C. Cir. 1971); Johns v. Smyth, 176 F.Supp. 949 (E.D. Va. 1959).

(b) Trial Counsel's unjustifiable introduction of petitioner's felony record

Secondly, even though petitioner never testified during the course of his defense, thereby negating the possibility that the jury would learn of his prior criminal record for the felonies of breaking and entering and armed robbery, defense counsel himself introduced petitioner's record into evidence (Tr. #2, 577; Mitig., 32). No reason for this unjustifiable action appears in the record. Had the prosecution attempted to introduce this evidence, it would have been precluded as inadmissible. The presentation of inadmissible and prejudicial evidence by defense counsel demonstrates

counsel's ineffectiveness and is sufficient by itself to require a new trial. See People v. Blevins, 251 Ill. 381, 96 N.E.2d 4 (1911).

(c) Trial counsel's failure to raise obvious constitutional objections to prejudicial evidence

Thirdly, defense counsel never raised a Fourth Amendment violation, which could have barred the admission of petitioner's confessions to the police. Specifically, the third time petitioner was arrested and questioned with regard to the instant case, he was arrested pursuant to a bench warrant which had already been set aside. When he was brought to the police station he was searched as incident to the illegal arrest, a trace of marijuana was found in one of his pockets, and he was charged with possession of marijuana. Petitioner was not arraigned in court on this charge until after he was interrogated four times and confronted by a witness two times, over the course of a period of more than twenty-four hours. It was during this period of repeated interrogation that petitioner confessed to involvement in the two incidents.

Under the fruit of the poisonous tree doctrine, which originated in Weeks v. United States, 232 U.S. 383 (1914) and was extended to verbal evidence in Wong Sun v. United States, 371 U.S. 471 (1963), such confessions are suppressable, as long as the causal connection between the Fourth Amendment violation and the resulting evidence has not become so attenuated as to dissipate the taint. Nardone v. United States, 308 U.S. 338 (1939). In the instant case, as in Brown v. Illinois, 422 U.S. 590 (1975), the causal connection was reinforced by the fact that the illegal bench warrant arrest was merely a pretext for additional interrogations of petitioner. Therefore, as in Brown, supra, the confessions which flowed from the illegal arrest could have been suppressed. See Whitely v. Warden, 401 U.S. 560 (1971). Counsel's failure to even raise this issue, either prior to or at trial, serves as further indication of his ineffectiveness and of the prejudice to the petitioner which resulted therefrom.

(d) Trial counsel's failure to object to prejudicial, inadmissible hearsay and opinion testimony

The fourth indication of trial counsel's ineffectiveness was his failure to object to extremely damaging, inadmissible hearsay and opinion testimony; namely, (1) the testimony of an acquaintance of petitioner, Sam Horn, who, after relating that petitioner never mentioned anything about a gun, stated that: "Somebody told me about the gun. Said the gun he didn't worry about the police never finding it, it had been destroyed" (Tr. #2, 421); and (2) the testimony of one of the police officers, Chief O'Neil, who stated that in obtaining the petitioner's confession: "We laid our cards on the table, we know he was trigger man for those two people,..." (Tr. #2, 529-30). Such testimony prejudiced petitioner, because it conveyed a highly incriminating fact, the destruction of the gun, to the jury, and because it enabled the highest ranking police official of the community to relate his opinion of the petitioner's guilt to the jury. Trial counsel's failure to object to this highly incriminating, inadmissible evidence provides one further self-sufficient reason for granting petitioner a new trial. See People v. Blevin, supra.

(e) Trial counsel's inquiry into previously unrevealed prejudicial evidence

Counsel's uncovering of previously unrelated, damaging evidence during his cross-examination of prosecution witnesses provides a fifth independent basis for finding that he rendered ineffective assistance of counsel as a matter of law. People v. Nitti, 312 Ill. 73, 143 N.E. 448 (1924). In the case at bar, counsel uncovered the following incriminating evidence during cross-examination: (1) that only one person left the beer dock in the red Mercury Cougar after the shooting (Tr. #1, 87); (2) that the Cougar being driven by petitioner at the time of his arrest was definitely the one which left the beer dock after the shooting (Tr. #1, 90-92); (3) that the driver of the Cougar was wearing either a small Afro or hat (Tr. #1, 93); (4) that there was a ski mask sitting in the red Cougar that petitioner was driving shortly after the motel

shooting (Tr. #1, 299); (5) that petitioner was wearing different clothes after the motel shooting than before, including a ski cap which covered his face (Tr. #1, 371); and (6) that petitioner removed a gun from his coveralls when removing his coveralls at a friend's house after the motel shooting (Tr. #1, 373-4). Thus, defense counsel did not provide zealous representation of his client, but instead served the prosecution's interest and did the prosecution's job.

(f) Counsel's failure to have his mentally deficient client examined by a defense expert.

Sixth, trial counsel never had his client examined by a defense expert to determine his competency, sanity, or, subsequent to conviction, to determine whether petitioner's conduct was primarily the product of his mental deficiency. Instead of presenting evidence relating to competency, sanity or mental deficiency, counsel merely cross-examined the court-appointed psychiatrist at the mitigation hearing. This psychiatrist, who served as a consultant to the State Department of Correction, admitted petitioner is mentally deficient, but stated that he could not express an opinion as to whether petitioner's involvement in the shootings was primarily the product of his mental deficiency (Mitig. 24-9,35, 42). He was able to determine that petitioner's mental deficiency was a factor in his criminal activities (Mitig. 42). The fact that the petitioner's I.Q. is only 68 raises a question as to his competency to stand trial and at a minimum petitioner is entitled to a remand for a determination of his competency at the time of trial. Drope v. Missouri, 420 U.S. 162 (1975).

In Ohio, Section 2929.04(B)(3) of the Revised Code places the burden of establishing that the offense was primarily the product of the offender's mental deficiency on the defendant by a preponderance of the evidence. In the case at bar, the court-appointed psychiatrist concluded that the petitioner was mentally deficient and determined that such deficiency was a factor in petitioner's criminal activities. But he stated he could not say, one way or the other, whether petitioner's

conduct was primarily the product of his mental deficiency. No further testimony was presented, and defense counsel never sought independent expert opinion to determine his client's conduct was primarily the product of his mental deficiency. Thus, petitioner was sentenced to death in a situation where the 51% burden of a preponderance was not met, but instead the scales rested at 50-50.

Under these circumstances, counsel's failure to even seek an independent determination of whether petitioner's conduct was primarily the product of his mental deficiency was inexcusable, see Tooley v. Rose, 507 F.2d 414 (6th Cir. 1974), and violated petitioner's right to present his own witnesses to establish a defense. Washington v. Texas, 388 U.S. 14 (1967). Had a defense expert been contacted, who felt petitioner's conduct was primarily the product of his deficiency, such evidence could have been presented and would have met the burden of a preponderance. Such a showing would have required the court to sentence petitioner to life imprisonment rather than death.

(g) Counsel's unfamiliarity with procedures governing criminal cases

Finally, petitioner addresses the Court to the following portions of the instant transcript, which reflect defense counsel's general unawareness of pretrial, trial and post-trial procedures governing criminal cases in Ohio: Mot. 1-4 [illegible] (unfamiliarity with discovery rules); Mitig. 3-4 (counsel proceeds with mitigation hearing without any evidence moments after first realizing he has burden of proof by a preponderance of the evidence); Tr. #2, 540, 578 (counsel does not move for a judgment of acquittal, either at the close of the prosecution's case or the close of all the evidence, even though such argument can be presented to the trial court outside the hearing of the jury, i.e., counsel never moved for what many jurisdictions refer to as a directed verdict; and counsel never challenged the validity of the death penalty in Ohio, even though counsel must have known that its constitutionality had not been, but would eventually be determined by the Ohio Supreme Court.

In conclusion, petitioner submits that, when considered as a whole, the above-seven factors constitutionally mandate a new trial, for the reason that petitioner's case was substantially prejudiced by his counsel's failure to render effective assistance.

B. OHIO REVISED CODE SECTIONS 2929.03(E) AND 2929.04(B) VIOLATE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BY PLACING ON THE DEFENDANT THE BURDEN OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT HE SHOULD NOT BE EXECUTED.

Following a verdict of guilty of aggravated murder with specifications, Ohio Revised Code Sections 2929.03(E) and 2929.04(B) place on the defendant the burden of proving by a preponderance of the evidence the existence of one of three mitigating circumstances in order to preclude imposition of the death penalty. By placing such a burden on the defendant these statutes violate due process of law under the principles enunciated by this court in In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975).

In Winship this court held that, as a matter of due process of law, the prosecution must prove beyond a reasonable doubt every fact necessary to constitute the crime charged. In reaching this result the court weighed the state's interest in convicting the guilty and avoiding erroneous acquittals against the defendant's interest in avoiding erroneous convictions. See 397 U.S. at 370-372 (Harlan, J. concurring). Perceiving the enormously destructive consequences of a criminal conviction, the court unhesitatingly chose to avoid conviction of the innocent, a choice that carried with it a standard of proof beyond a reasonable doubt. Necessarily, that choice also allocated the burden of proof to the state.

In Mullaney the court was concerned with the application of Winship to a Maine procedure which placed on the defendant the burden of proving, by a preponderance, the existence of provocation to reduce murder to voluntary manslaughter. As the Maine Supreme Court had interpreted Maine law, there was but a single, generic offense of voluntary criminal homicide, and the labels "murder" and "voluntary manslaughter" described only punishment categories. 421 U.S. at 688-9,691, 699. The

State of Maine argued in Mullaney, then, that Winship should not apply because in Winship the facts at issue were essential to establish criminality in the first instance whereas the fact in question in Mullaney did not come into play until the jury had already determined that the defendant was guilty. Id. at 697. In rejecting that argument, the court noted that such an analysis failed to recognize that criminal laws are concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. The court held that Maine could not distinguish between those who kill in the heat of passion and those who kill in the absence of that factor, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, without denigrating the principles found critical in Winship. Id. at 697-8.

Likewise, the Ohio death penalty scheme is concerned not only with the guilt or innocence of the defendant but also with the degree of criminal culpability. Ohio treats those who kill as a result of a mitigating factor differently from those who kill in the absence of such a factor. Yet, Ohio, like Maine, places the burden of establishing the fact upon which that distinction turns upon the defendant. Such a procedure denigrates the very same principles found critical in Winship and Mullaney.

The facts of the case at bar strikingly illustrate that Ohio's death penalty scheme is unquestionably an unreliable procedure for determining the critical issue of who should live and die. By placing the burden on the defendant, Ohio made the decision to execute Jesse Black on the basis of the testimony of the state's neuropsychiatrist who, while he was able to conclude that Jesse was mentally deficient, was unable to form an opinion on the ultimate question of mitigation, namely, whether Jesse's involvement in the shootings was primarily the product of his mental deficiency. Had the burden been on the state, Jesse Black would not now be condemned to die. This burden shifting procedure does not

begin to meet the due process "need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Both Winship and Mullaney sought to improve the reliability of the fact-determining process when issues of such critical importance are at stake. Speaking of the Maine procedure, the Court observed in Mullaney, supra at 703:

> Under this burden of proof, a defendant can be given a life sentence when the evidence indicates that it is as likely as not that he deserves a significantly lesser sentence. This is an intolerable result in a society where, to paraphrase Mr. Justice Harlan, it is far worse to sentence one guilty only of manslaughter as a murderer than to sentence a murderer for the lesser crime of manslaughter (emphasis added).

The possibility of an erroneous decision to execute Jesse Black is even more intolerable than the possible erroneous decisions in Winship and Mullaney. Yet, Ohio has condemned Jesse Black to die when the evidence indicates that it is as likely as not that he deserves to live, although in a prison: Such a procedure is a flagrant violation of Jesse Black's right to due process of law.

C. OHIO'S DEATH PENALTY SCHEME IS UNCONSTITUTIONAL, CONSIDERING THE ILLUSORY NATURE OF SOME OF THE SPECIFIED MITIGATING FACTORS, THE NARROW SCOPE OF WHAT REMAINS AND THE IRRELEVANCE OF NONSPECIFIED FACTORS AND THE FACT THAT OHIO DOES NOT HAVE A SYSTEM OF APPELLATE REVIEW OF ALL DEATH SENTENCES WHICH INCLUDES A COMPARISON OF CASE BY CASE FACTS TO INSURE THAT A DEATH SENTENCE IN A PARTICULAR CASE IS WARRANTED.

Revised Code of Ohio, Section 2929.04(B) sets forth three (3) mitigating circumstances:

> (1) The victim of the offense induced or facilitated it.
> (2) It is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation.
> (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

If a defendant convicted of aggravated murder with specifications fails to establish by a preponderance of the evidence

one of these three factors the defendant must be sentenced to die. Close analysis of these factors will disclose that some of them are illusory, the remaining factors are quite narrow and the list of specified factors is exclusive, thereby precluding the trial judge from "consideration of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 96 S.Ct. 2978 (1976). As a result, the Ohio death penalty scheme is the functional equivalent of the mandatory statutes struck down by this Court in Woodsum, supra and Roberts v. Louisiana, 96 S.Ct. 3001 (1976).

The first mitigating factor presumably refers to consensual "mercy killing," for without a willing victim no consideration would ever be given to this curcumstance. Before this factor becomes relevant, however, the defendant must first be found guilty of aggravated murder with a specially aggravating circumstance. The aggravating circumstances specified in R.C. §2929.04(A), however, are fundamentally inconsistent with a mercy killing. It strains credulity to posit that a mercy killing could ever involve one of the aggravating circumstances. Thus, the first mitigating factor delineated in R.C. 2929.04(A) is illusory It simply does not exist.

The second mitigating factor is virtually identical to Ohio's formulation of the insantiy defense as announced in State v. Staten, 18 Ohio St.2d 13 (1969):

> "One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law."

Conviction of aggravated murder with specification where the defense is insanity which, of course, demands that the crime was primarily a product of the accused's mental condition, leaves no room for asserting mental condition as a mitigating factor because there is just no substantial difference between the Ohio definition of insanity and the psychosis or mental

deficiency contained in this mitigating circumstance. Where a trial jury rejects the insanity defense, such verdict realistically rejects the mitigating circumstance.

The final mitigating factor, dealing with duress, coercion or a strong provocation, is equally illusory in application. Although the Ohio Supreme Court in State v. Woods, 48 Ohio St.2d 127 (1976) recognized that mitigating duress and coercion would be nullified if these terms were given their traditionally narrow, criminal law definitions, thereby construing the terms broadly, the Court's application of this mitigating factor has all but nullified it. In both Woods, supra and State v. Bell, 48 Ohio St.2d 270 (1976) the Court held that neither defendant was under duress or coercion because neither had abandoned their criminal activity when they supposedly had an opportunity. This attitude and approach begs the obvious, for it is unlikely or impossible that those easily influenced, led, dominated or inherently weak will or could ever break from the strong and flee. Both Woods and Bell, supra effectively eliminate this mitigating factor for anyone who actually commits aggravated murder.

Thus, Ohio's mitigating factors are either so illusory or narrow as to be totally ineffectual as a basis for deciding when the death penalty should be precluded. Although R.C. §2929.04(B) purports to permit consideration of other factors, such as the history, character and condition of the offender, those factors may be considered only as they relate to the three statutory mitigating circumstances. Since, as discussed above, those circumstances are so narrow as to be illusory and any other factors are irrelevant, the Ohio death penalty scheme imposes the death penalty in violation of due process of law.

Appellate review of death sentences (not merely conviction) is required by the decision of this Court. Such review is an "important additional safeguard against arbitrariness and caprice." Gregg v. Georgia, 96 S.Ct. 2909, 2937 (1976). In the first death penalty case to reach the Ohio Supreme Court, State v. Bayless, 48 Ohio St.2d 73 (1976) the Court held that

it possesses the authority to review death sentences, but the issue now is whether or not the Court has ever reviewed adequately a death sentence to insure that it is proportionate to the sentence imposed in a similar case. To date, the Ohio Supreme Court has affirmed seventeen (17) of eighteen (18) death sentences, reversing one conviction only for evidentiary error unrelated to sentence. Yet in Proffitt v. Florida, 96 S.Ct. 2967 (1976) the facts indicated that the Florida Supreme Court had set aside the death sentence in 40% of the cases it considered (pp. 2969-70). It appears that Ohio has not compared any one death case with any other death case, and has announced no rule or procedure for obtaining information about cases in which the trial judge found that mitigating circumstances existed and the death penalty was not imposed. In fact, in one case State v. Woods, 48 Ohio St.2d 127 (1976), the Court reviewed and affirmed the death sentence when it did not even have the pre-sentence report required to be made by statute. It is unconceivable that the Ohio appellate review process is at all adequate when the death sentence can be affirmed under such circumstances.

Ohio's death penalty scheme then, is nothing more than a thinly disguised mandatory procedure for imposing the death penalty. Although various factors may be considered, they may be considered only as they affect the extremely narrow and illusory mitigating circumstances. Further, Ohio's appellate review process provides no assusrance against disproportionality as required by Jurek v. Texas, 96 S.Ct. 2950 (1976). Ohio's death scheme as a whole is a totally inadequate procedure for guarding against the arbitrary and capricious imposition of the death penalty.

D. THE STATE HAS NOT ESTABLISHED ITS BURDEN OF PROVING A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER BY THE DEFENDANT OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, PRIOR TO SECURING A CONFESSION, IN LIGHT OF NUMEROUS ARRESTS, LENGTHY INTERROGATIONS, PERSISTENT REFUSALS BY THE DEFENDANT TO SIGN A RIGHTS WAIVER FORM OR MAKE A STATEMENT, AND THE DENIAL OF DEFENDANT'S REQUEST TO SPEAK WITH HIS ATTORNEY.

This Court has consistently recognized the "inherently coercive" nature of an in-custody police interrogation. Miranda v. Arizona, 384 U.S. 436 (1966); Schneckloth v. Bustamante, 412 U.S. 218, 247 (1973); Escobedo v. Illinois, 378 U.S. 478 (1964). Such coercion can, of course, be mental as well as physical. Blackburn v. Alabama, 361 U.S. 199, 206 (1960). In Miranda the Court "concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individuals will to resist and to compel him to speak where he would not otherwise do so freely." 384 U.S. at 467. The Miranda court then proceeded to establish required warnings, providing that once the warnings are given the "subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease...If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." 384 U.S. at 444. A confession taken in violation of these safeguards, absent a voluntary, knowing and intelligent waiver of the rights protected thereby, is per se inadmissible.

This case represents a classic example of "inherently coercive" police practices. The facts indicate a pattern of arrests followed by lengthy interrogations. Despite the dictates of Miranda, however, the police did not cease the interrogation after Jesse steadfastly refused to sign a rights waiver form and indicated his desire to remain silent. The testimony of one police officer is illustrative of the interrogation techniques employed:

> After we advise him of his rights, and he refuses to sign them we proceed on to question him in regard to what he was being held for." (Mot. 6)

Unlike Michigan v. Mosley, 423 U.S. 96 (1975), then, this is clearly a case "where the police failed to honor a decision of

to discontinue the interrogation upon request to be provided in repeated efforts to wear down his resistance and make him change his mind." 423 U.S. at 105.

Other than requests to have Jesse sign a rights waiver, which he refused to do, the police did not at any time prior to Jesse's first incriminating statement try to elicit a voluntary, knowing and intelligent waiver from him. And it is clear that a valid waiver will not be presumed "from the fact that a confession was in fact eventually obtained." 384 U.S. at 475. On the contrary the fact of the lengthy interrogation before Jesse made his statement "is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so." 384 U.S. at 476.

Even more blatant than the violation of the defendant's privilege against self-incrimination was the outright denial of his Sixth Amendment right to counsel. Although the police knew Jesse had an attorney, they did not cease their interrogation until that attorney could be present. In fact, just before the interrogation on the morning of February 12th at which Jesse made his first incriminating statement, at a time when the officers' persistent coercive interrogation techniques were finally overbearing the defendant's will, Jesse was denied his request to talk with his attorney in direct violation of the principles of Escobedo v. Illinois, 378 U.S. 478 (1964) and Massiah v. United States, 377 U.S. 201 (1964). This Court's recent decision in Brewer v. Williams, 20 C.L. 3095 (1977) has served to re-emphasize the importance of the indispensable right to counsel, especially at the critical pretrial stage. Although a defendant can, of course, waive that right, courts indulge in every reasonable presumption against waiver, e.g. Brookhart v. Janis, 384 U.S. 1, 4(1966). In order to establish a waiver, the state must bear the heavy burden of proving "an intentional relinquishment or abandonment

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of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938). As in Brewer v. Williams, supra "a review of the record here...discloses no facts to support the conclusion of the state court that [Black] had waived his constitutional rights other than that [he] had made incriminating statements..." (20 Cr. L. at 3100, quoting with favor from Court of Appeals decision, 509 F.2d at 233).

Although the police repeated the required Miranda warnings before each interrogation, the officers failed to comply with the subsequent procedure outlined in that case, namely that they cease the interrogation when the defendant indicates his desire to remain silent or to contact a lawyer. In addition there is no evidence whatsoever to support the state's heavy burden of proving a valid waiver of the defendant's Fifth, Sixth, and Fourteenth Amendment rights. The confession obtained in the absence of such a waiver was thus in violation of Jesse Black's constitutional right to counsel and privilege against self-incrimination and as such, was inadmissible at his trial.

VII. CONCLUSION

For the reasons contained herein, certiorari should be granted.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I, Bruce R. Jacob, counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12 day of April, 1977, I served a copy of the foregoing Petition for a Writ of Certiorari to The Supreme Court of Ohio by mailing a copy in a duly addressed envelope, with first class postage pre-paid, to the offices of William F. McKee, Prosecuting Attorney for Richland County, 38 South Park Street, Mansfield, Ohio 44902 and William J. Brown, Attorney General for the State of Ohio, 30 East Broad Street, Columbus, Ohio 43215.

Bruce R. Jacob
BRUCE R. JACOB
Counsel for Petitioner

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CLERK OF COURTS

Case No. 8304

IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

STATE OF OHIO, Plaintiff, vs. JESSE BLACK, Defendant.	)	INDICTMENT: Aggravated Murder (Two Counts) R.C. 2903.01 with Specifications in R.C. 2929.04
	)	JOURNAL ENTRY

On May 13, 1974, came the Prosecuting Attorney on behalf of the State of Ohio, and the defendant, Jesse Black, being in court in custody of the Sheriff, represented by his attorney, Rees Davis, for trial on an Indictment charging defendant with two counts of Aggravated Murder with one Specification on the first count and two Specifications on the second count (R.C.2903.01), such trial having begun on April 29, 1974; upon consideration of the evidence, arguments by counsel and charge by the court, the jury returned a verdict of Guilty on the first count of Aggravated Murder and a verdict of Guilty on the Specification to the first count, and a verdict of Guilty on the second count of the Indictment charging Aggravated Murder, and a verdict of Guilty to the two Specifications of said second count, such verdicts were accepted by the court.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the jury verdicts of Guilty to the two count Indictment of Aggravated Murder and all Specifications to said Indictment are hereby accepted by the court.

IT IS FURTHER ORDERED that the defendant be remanded to the custody of the Sheriff and this matter is continued pursuant to Section 2929.03, of the Ohio Revised Code.

Rex Larson, Judge

William F. McKee
Prosecuting Attorney

Rees Davis
Attorney for Defendant

JUL 5 1974
GENE COFFEY
CLERK OF COURTS

Case No. 8304

IN THE COMMON PLEAS COURT OF RICHLAND COUNTY, OHIO

STATE OF OHIO, Plaintiff, vs. JESSE BLACK, Defendant.	) INDICTMENT:	Aggravated Murder (Two Counts) R.C. 2903.01 with Specifications in R.C. 2929.04
	)	JOURNAL ENTRY

On July 8, 1974, came the Prosecuting Attorney on behalf of the State of Ohio, and the defendant, Jesse Black, being in Court in custody of the Sheriff, represented by his attorney, Rees Davis, for hearing and sentence in accordance with Section 2929.03, Revised Code; the Court having heretofore on the 5th day of July, 1974 in the presence of the defendant, Jesse Black, and his attorney, Rees Davis, overruled the motion for a new trial filed on behalf of said defendant and pursuant to said Section, the Court having required a pre-sentence investigation and a psychiatric examination to be made and having considered the testimony and other evidence and the statements of counsel and the reports, and upon consideration thereof the Court finds as follows, to-wit: the Court finds that the defendant having been tried by a jury, that on May 13, 1974, the jury found the defendant guilty on Count One of the Indictment, which was the Aggravated Murder of Olga Laderman; and that the jury found the defendant guilty of the Specifications as to Count One, in that the defendant committed the Aggravated Murder of Olga Laderman while committing Aggravated Robbery; and that said jury found the defendant guilty as to Count Two of the Indictment which was the Aggravated Murder of Robert B. Staples; and that the jury found the defendant guilty of Specification One as to the Second Count in that the Aggravated Murder of Robert B. Staples was while

committing Aggravated Robbery; and that the jury found the defendant guilty of Specification Two as to the Second Count in that the Aggravated Murder of Robert B. Staples was part of a course of conduct involving the purposeful killing of two persons by him, and the Court coming to pronounce sentence inquired of the defendant and his attorney if he or they had anything to say before sentence is pronounced, and the defendant having addressed the Court; the Court finds upon consideration of the reports and the testimony and the arguments of counsel and any other evidence that is before the Court that none of the three mitigating circumstances set out in Section 2929.04 have been established as to the Aggravated Murder as to Count One or Count Two in the said Indictment and that the Court is therefore obligated to sentence the defendant, Jesse Black, in accordance with Section 2929.03, Revised Code.

IT IS, THEREFORE, ORDERED, ADJUDGED and DECREED that the defendant, Jesse Black, be sentenced to death on Count One of the Indictment and further that the defendant, Jesse Black, be sentenced to death on Count Two of the Indictment, and that the defendant, Jesse Black, be remanded to the custody of the Sheriff of Richland County for the delivery of said defendant to the State of Ohio to the Chillicothe Correctional Institute, at Chillicothe, Ohio, for the execution of the sentence of this Court in accordance with law at the earliest date possible under the statutes of Ohio.

The Court after having imposed sentence for a serious offense which has gone to trial on a plea of not guilty, the Court having advised the defendant that he has a right of appeal; that if he is unable to pay the costs of an appeal he has the right to appeal without payment; that if he is unable to obtain counsel for an appeal, counsel will be appointed without costs;

that if he is unable to pay the costs of documents necessary to an appeal, such documents will be provided without costs and that he has a right to have the notice of appeal timely filed on his behalf and upon the request of defendant, Jesse Black, for the appointment of counsel for appeal, the Court does forthwith appoint Attorney Kenneth G. Frizzell for appeal.

Rex Larson, Judge

William F. McKee
Prosecuting Attorney

Rees Davis
Attorney for Defendant

NOV 28 1975
CLERK

IN THE COURT OF APPEALS, FIFTH DISTRICT

RICHLAND COUNTY, OHIO

STATE OF OHIO	JUDGES:
Plaintiff-Appellee	Hon. Leland Rutherford, P.J. Hon. Norman J. Putman, J. Hon. David D. Dowd, Jr., J.
-vs-	
JESSE BLACK	CASE NO. 1317
Defendant-Appellant	M E M O
	Decided Nov. 28, 1975

APPEARANCES:

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ATTORNEY FOR DEFENDANT-APPELLANT

DOWD, J.

This is an appeal from a death sentence arising from a conviction on two counts of aggravated murder, each charging a purposeful killing while the defendant was perpetrating a robbery. Both killings occurred on January 21, 1974.

Both victims died as a result of a single gun shot wound. The first killing took place in late afternoon at the Bel-Aire Motel in Ontario and the motel manager, Olga Ladderman, was the shooting victim. The second killing occurred several hours later in Mansfield when Robert Staples, the operator of the East Side Beer Dock, was shot.

The defendant was subsequently indicted in February, 1974. The case was tried in May of 1974 to a jury. The prosecution presented overwhelming proof of the defendant's guilt. The testimony included admissions to the killings made by the defendant to his girl friend, June Smith, (R.241, 313) and to several other friends (R. 318, 394), and separate confessions as to each killing with considerable details.[1] The fatal bullets, 9 MM caliber, were recovered and expert opinion testimony was offered that both bullets had been fired from the same weapon, a Walter P-38 or Luger (R. 187). Another friend testified to have seen a German Luger-like pistol in an automobile under defendant's control the night of the killings (R. 213).

1. Black admitted Olga Ladderman's killing but denied killing Staples, admitting only that he was involved with his friend, Jimmie Eatmon in the second robbery and that Eatmon had killed Staples.

The defense relied upon the presumption of innocence and presented no direct testimony claiming innocence. The jury found the defendant guilty of both counts and also guilty of aggravating circumstances in connection with each homicide. (R.C. 2929.04 (A)(7)).

Following the verdict, the trial court ordered a pre-sentence investigation and a psychiatric examination in compliance with R.C. 2929.03 (D).

Subsequently, in July of 1974, the trial court conducted the hearing required pursuant to the provisions of R.C. 2929.03(D) and at its conclusion, ruled that none of the three mitigating circumstances provided by R.C. 2929.04 had been established and imposed the sentence of death as required by R.C. 2929.03(E).

The defendant-appellant has filed thirteen assignments of error. We consider those assignments to naturally fall into the following five catagories:

I. Black's oral and written statements should have been suppressed.(Assignment of error #13)

II. Ohio's death penalty is unconstitutional. (Assignments of error #11 and #12)

III. The sentencing statute, R.C. 2929.04(B)(3), is vague and ambiguous. (Assignment of error #10)

IV. The procedure followed in the mitigation hearing was erroneous. (Assignments of error #3, #4, #5, #6, #7, and #9).

V. The defendant was denied effective counsel. (Assignments of error #1, #2, and #8).

We shall consider the five subjects chronologically.

I.

We turn first to consider whether the defendant's oral admissions and written confessions were properly admitted. Prior to the trial, the defendant filed a motion to suppress both oral and written statements made to the police claiming that the statements were made without counsel, made without a warning or explanation of the defendant's rights, and that the statements were made under circumstances rendering them inadmissible due to the defendant's mental and physical condition.

The trial court conducted a pre-trial evidentiary hearing in response to defendant's motion to suppress the oral and written statements. The state introduced testimony

establishing that the defendant made incriminating oral admissions and then signed and initialed two statements on the afternoon of February 13, 1974. The first written statement described in considerable detail the motel slaying in Ontario. The second written statement, similar as to extensive detail, described the Mansfield killing. Copies of the two confessions are mechanically reproduced and attached as Exhibits A and B.

The trial court ruled, prior to trial and in compliance with Criminal Rule 12(E), that none of the oral or written statements were taken in violation of the defendant's constitutional rights and the motion to suppress was overruled.

A review chronologically of the interrogation and responses of the defendant leading to the taking of the written confessions on February 13, 1974, is appropriate. Our review is limited to the testimony presented at the hearing on the motion to suppress, as the trial court was likewise limited in weighing the motion to suppress.

THE JANUARY 22, 1974, ARREST, LINEUP AND INTERVIEW.

Black was arrested at 8:13 a.m. on January 22, 1974, (M.R.-106)[1] while in an automobile being driven by

1. M.R. stands for Motion To Suppress Record.

his girlfriend, June Smith (M.R.-114), questioned by detectives (M.R.-115), placed in a lineup and released at 5:13 p.m. on the same day (M.R.-100). The defendant denied any knowledge of the killings (M.R.-115).

THE JANUARY 28, 1974, ARREST AND INTERROGATION.

Black was arrested by officers of the Mansfield Police Department and placed in the Mansfield City Jail on January 28, 1974, at 6:14 p.m. for investigation of "armed robbery" and subsequently released on January 30, 1974, at 9:20 a.m. (M.R.-106). He was interrogated by Lt. Hriesk of the Mansfield Police Department for approximately twenty minutes on the evening of January 28. The defendant kept saying "no comment, on advice of his attorney." (M.R.-61). The defendant testified that he was repeatedly questioned during one and one-half days of the incarceration (M.R.-117, 118).

THE JANUARY 31, 1974, RECKLESS OPERATION ARREST

Black was arrested by officers of the Mansfield Police Department at 11:15 p.m. on January 31, 1974, for reckless operation while driving June Smith's car. (M.R.-106, 118). He called his lawyer, Rees Davis, from the jail. Mr. Davis came to the station and the defendant was released after being given a breath test and a traffic citation. (M.R.-118). Black was apparently not questioned in regard to the homicides.

THE FEBRUARY 11, 1974, ARREST ON A BENCH WARRANT LEADING TO THE SUBSEQUENT CHARGE OF POSSESSION OF MARIJUANA.

Black subsequently appeared in traffic court on February 6, 1974, in regard to the traffic citation issued January 31, 1974, one day after the February 5, 1974, designated date. Apparently a bench warrant was issued after the failure of the defendant to appear on February 5, 1974, and not withdrawn despite the February 6, 1974, appearance. On February 11, 1974, the defendant was arrested at 10:12 a.m. on the bench warrant that should have been withdrawn following the February 6th appearance. The defendant was searched and charged with the additional offense of possession of marijuana (M.R.-106). He appeared in open court on February 12, 1974, on the charge of possession of marijuana and bond was initially set at $100.00. Bond was subsequently increased on February 12, 1974, to $5,000.00 (M.R.-121). The defendant was unable to post bond. He remained in the Mansfield City Jail held on the possession of marijuana charge until he was subsequently charged at 7:10 p.m. on February 13, 1974, with aggravated murder in connection with the two homicides at issue in this appeal.

THE FIRST FEBRUARY 11, 1974, QUESTIONING.

Following the February 11, 1974, arrest for possession of marijuana, Black was first questioned in the Mansfield City Jail by Lt. Hriesk and Patrolman Hildebrand. The questioning began at 10:24 a.m. A "Miranda" waiver and warning card was displayed and read to Black. The card with the "warning" language on one side and the "waiver" language on the other side, was in the following form:

NAME _____ LOCATION _____

Having been taken into custody or your freedom of action significally restrained you are advised:

1. You have the right to remain silent.
2. What you say can be used against you in a court of law.
3. You have the right to the presence of an attorney while being questioned.
4. You have the right that if you can't afford an attorney, there will be no questioning until one is appointed for you.
5. You have the right to stop making a statement once started.

_____ _____
Officer Signature Date

_____ _____
Witness Signature Time

WAIVER

I have read on this card the statement of my rights and understand what my rights are. I do not wish to remain silent. I do not want an attorney present.

Witness Signature _____ Subject Signature _____

Time _____ Date _____

Lt. Hriesk described the practice of the Mansfield Police Department in the use of the rights card and stated that the practice was "to read it to the individual and ask if he understood those rights and ask him to sign the card and when he refused to sign the card, mark on the card the fact of the refusal." (M.R.-38). In response to this practice, Lt. Hriesk testified that Black stated that he was not signing anything, that he understood his rights, but he refused to say anything about either homicide. No request was made for a lawyer (M.R.-28) in the interview that lasted two hours (M.R.-59). State's Exhibit 3 was introduced as the "Miranda" card used for that questioning.

THE SECOND FEBRUARY 11, 1974, QUESTIONING

Lt. Hriesk and Captain Krauss of the Ontario Police Department began the second questioning of Black on February 11, 1974, at 1:45 p.m. Lt. Hriesk testified that the rights were again read, using a similar but different card (State's Exhibit 4) and again Black stated that he

understood, but refused to sign the card or discuss either the Ontario Motel slaying or the beer dock slaying. (M.R.-39,40). Apparently as a result of that interview, Black was permitted to phone a friend, Sam Horn, and his attorney, Rees Davis (M.R.-40). He reached the office of Mr. Davis but apparently did not talk with him (M.R.-63).

THE FIRST FEBRUARY 12, 1974, QUESTIONING

Black was first questioned on February 12, 1974 from 8:15 a.m. to 8:40 a.m. by Patrolman Butler and Sgt. Groscost of the Mansfield Police Department. He was advised of his rights from a similar Miranda card (State's Exhibit 1) and again refused to sign (M.R.-5) and then answered "no" to most of Patrolman Butler's questions, the nature of which were not explained.

THE FIRST JESSE BLACK-JIMMIE EATMON CONFRONTATION ON FEBRUARY 12, 1974.

Black was confronted with Jimmie Eatmon (a state's witness who testified to Black's highly incriminating admissions at the trial on the merits, (R. 314-381)) in the Mansfield City Jail at 9:05 a.m., twenty-five minutes after the first questioning by Butler and Groscost had ended. Present were Patrolmen Butler, Sgt. Groscost, Lt. Hriesk, Eatmon and Black (M.R.-8). When so gathered, Eatmon was asked to repeat

"some information that he had given us prior to that". (M.R. 8, 41). Eatmon requested and was given the opportunity to call his attorney. Black did not make a similar request (M.R. 41). After Eatmon called his attorney, he returned and according to Lt. Hriesk, told Black that "he told the police what he knew about the incident, that he would testify and tell the court, and that Lt. Hriesk knows all about it". (M.R. 41). Eatmon was removed, Black said nothing and was returned to his cell.

THE SECOND FEBRUARY 12, 1974, QUESTIONING AND THE FIRST ADMISSIONS BY BLACK.

The second February 12th questioning produced the first oral admissions from Black. The questioning began shortly after the Eatmon confrontation at 10:15 a.m. with Lt. Hriesk, Patrolman Butler and Sgt. Groscost present. We set forth Lt. Hriesk's testimony concerning the first admissions:

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Question #2, page 42 thru Answer to Question #2, page 44.

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"Q. 2 Did you see Jesse again on the 12th?

A. Yes.

Q. 3 At approximately what time?

A. About 10:15 in the morning.

Q. 4 Who was present and where was it?

A. Patrolman Marcus Butler and myself removed Jesse from his cell and took him into the lineup room.

Q. 5 What was said at that time when he got in the lineup room?

A. I asked if he understood his rights and he said yes. I said he should straighten the matter out, he said before he talked he would want to talk to his father and girlfriend. He stated he knew about the woman he was responsible for the one in Ontario but she reached for the gun and it went off but he was not the one that shot the gun on East Second Street. He said he would give us the whole story after he talked to his father and girlfriend.

Q. 6 Did he ask to call his father or girlfriend at this time?

A. Not at this time no.

Q. 7 What was done then?

A. I asked him if he would repeat the same thing he told Officer Butler and I to Major O'Neil, he is chief now. He said he would. I told him I would get Major O'Neil which I did.

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Q. 1 What was done after you got Major O'Neil?

A. He was brought into the room and Major O'Neil advised us to read the Rights card to him and have him sign it which was done. This was read by Officer Butler at that time I did not have that card.

Q. 2 I hand you what has been marked for purpose of identification State's exhibit 2 and ask if you can identify that?

A. Yes this is the Rights card which was read to him at that time by Officer Butler.

Q. 3 This is at what time?

A. 10:20 a.m. They got 1020 hours on here it was 10:20 in the morning.

Q. 4 Who read that?

A. Patrolman Marcus Butler.

Q. 5 Were you present when he read it?

A. Yes.

Q. 6 All right. After the Rights card was completed what if anything was said or done?

A. He also then told Major O'Neil that he knew about it he shot the woman but not the one down on East Second Street. Then Major O'Neil at that time asked why, he stated he said the woman she grabbed the gun. Major O'Neil asked who was driving the car. He said Jimmie Eatmon was driving the car, at the motel Jimmie stayed in the car while Jesse went in and robbed and shot the woman. Major O'Neil asked whose automobile they were using. He stated Jimmie Eatmon had borrowed it from someone he didn't know who. He said it was a blue automobile.

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Q. 1 Did he say anything else about the car?

A. At that time he thought it belonged to Jimmie Eatmon or borrowed by Jimmie Eatmon from somebody else. Jimmie was driving the car. Then he said Jimmie Eatmon was the person that shot the man down on East Second Street.

Q. 2 Did he say anything else at this time?

A. Then he stated he wanted to talk to his father and also his girlfriend. Again he demands to be brought back face to face with Jimmie Eatmon again and he would give his statement. "

The warning card (State's Exhibit 2) used in this interview was signed by Jesse Black on the line under the large word "NAME" in the upper left hand corner on the warning side of the card but Black refused to sign the waiver (M.R. 10).

Lt. Hriesk also testified that Black's father came to the police station after the second interview on February 12, and Black told his father that "he (Jesse Black) had told us he had done it just to get us off his back" (M.R. 47).

THE SECOND JESSE BLACK-JIMMIE EATMON CONFRONTATION ON FEBRUARY 12, 1974.

Lt. Hriesk testified about a second Black-Eatmon confrontation on February 12, 1974, that occurred after the second questioning which had produced the first oral admission by Black. Lt. Hriesk asked Black if he wished for another face-to-face meeting with Eatmon. Black agreed. When confronting Eatmon, Hriesk testified that Black stated:

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Answer #1, page 45 thru Answer #3, page 46.

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"A. 1 At this time Jesse said I am tired of lying(sic) for both of us. Jesse acted like he was mad at this time he said Eatmon was driving the car at the motel at Ontario, he went inside and rob the woman and shot her. Also he

and Jimmie Eatmon where car he had at that time and he said it was blue and wanted to know who it belonged to and Jimmie Eatmon had borrowed it from somebody at Beulah Fay's on Bowman. Then Jimmie Eatmon interrupted and said he knew several fellows at Beulah Fay's that had borrowed the automobile and one person's name was Grandview or something similar, he did't know his name but he was out at Beulah Fay's all the time. Jesse told Jimmie had cased the motel that morning the day of the shooting in Ontario. While casing the motel Jimmie talked to the woman about room rates, told her he didn't have any money, he would get money and come back. Jimmie denied knowledge of the robbery and shooting or being at the motel.

At that time Jesse told how they drove down to the beer dock on East Second Street parked near the Rib House.

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Q. 1 Where is the Rib House?

A. Down around Second and Hedges. He didn't give the number at that time I knew where it was. He claims he got out and walked around to the rear of the drive through beer doct (sic). Jimmie Eatmon drove and got in the driver seat and drove the red Cougar inside the beer dock.

Q. 2 Did he say anything else about the red Cougar whose it was?

A. Not at that time. He said Eatmon shot and robbed Mr. Staples and pick him up at the rear of the building. Jesse also said the weapon used in both of these matters belonged to Jimmie Eatmon. Eatmon denied any knowledge of any weapon and shooting Jesse was talking about. And Jimmie again told Jesse he told the police what he knew about the the matter and he would tell it in court.

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Q. 3 What happened then?

A. It was about this time Jesse asked Jimmie how much money did you get. Jimmie said what are you talking about and Jimmie denied any part in the robbery again. Then Jesse didn't want to say anything more until he talked to his father and he was returned to his cell."

THE FEBRUARY 13, 1974, INTERVIEW RESULTING IN THE WRITTEN CONFESSION.

On February 13, 1974, Black was again questioned. Present were Captain Krause of the Ontario Police Department, Major O'Neil, Captain Groscost and Lt. Hriesk of the Mansfield Police Department. At the outset, Major O'Neil advised Black that he was charged with aggravated murder and could get either life or death and then asked if he wanted to make a statement (M.R. 76). Black answered affirmatively and was then advised of his rights from State's Exhibit 5, another Miranda warning and waiver card. Black signed the card on both the warning and waiver side and placed his initials on the warning side of the card five times (M.R. 76, 77). After the signing, Major O'Neil asked Black about both shootings. Two separate statements were then taken. The first statement (Exhibit "A") consisted of questions and answers covering the Ontario shooting. The second statement, (Exhibit "B") also consisting of

questions and answers, covered the Mansfield beer dock slaying. Black initialed and signed both confessions.

BLACK'S POST CONFESSION ADMISSIONS ON FEBRUARY 13, 1974.

After the written confessions were completed, Black talked to his sister, his father, and his girlfriend, June Smith, and Reverend Griffith, at the jail. Lt. Hriesk testified to the content of Black's conversations with his father, girlfriend, and sister. Black told his father that "the woman grabbed his gun and the gun went off and it was an accident". (M.R. 48). Black was unable to explain in response to his father's question why he had done it. Black told June Smith, his girlfriend, in Lt. Hriesk's words, that "he told us the truth". Black told his sister that he told the truth and that he robbed the lady, she grabbed the gun and it went off. The sister then admonished Black saying, "you are trying to hang yourself".

BLACK'S TESTIMONY

Black testified in support of his motion to suppress. He claimed that he had been subjected to constant day and night questioning during the three day period of February 11 to February 13, 1974, that he had not been permitted to change his clothes or to eat, and had only had eight hours of sleep during the three day period. He claimed that one of his attempts to call Mr. Davis, his lawyer, was rejected

by Major O'Neil who told him that "you (Mr. Davis) had to drop my case".

Thus we consider whether the evidence presented at the suppression hearing supports the trial court's determination that the dictates of the Miranda Rule were followed and that the oral and written statements were voluntary.

THE MIRANDA ISSUE

A. THE WARNINGS

We turn first to a consideration of the Miranda issue. The prosecutor established that Black was repeatedly warned during the various interrogations on February 11, 12 and 13, 1974. The written and signed confessions included a Miranda warning. We find ample testimony and proof to establish the fact of the Miranda warning throughout the questioning process.

A careful examination of the commencement of the second questioning on February 12th is appropriate as it produced the first damaging admissions. Lt. Hriesk testified that the complete Miranda warning was not administered until after the first admission.[2]

2. See Hriesk's testimony beginning at page 11 of this opinion.

First one could argue that Black's first admission in response to Lt. Hriesk's suggestion that "Black straighten the matter out" was "volunteered" and thus not the result of custodial interrogation negating the application of Miranda. See *Haire v. Sarver, 437 Fed. 2d. 1262, Cert. Denied, 404 U.S. 910.* We think not. Under all the circumstances, we construe Lt. Hriesk's suggestion to be a continuation of the custodial interrogation. However, we find Black's response, upon entering the lineup room, that he understood his rights following two Miranda warnings administered on the previous day and a warning just two hours earlier on the same day in question, to be sufficient to establish compliance with the warning requirement of Miranda prior to Black's first admissions.

B. THE WAIVER

Counsel for the defendant contends that the defendant's refusal to sign the "waiver" portion of the Miranda warning introduced as exhibits at the suppression hearing, (state's exhibits 1 through 4) negate the Miranda waiver. If we assume arguendo that the defendant's persistent refusal to sign the waiver portion of the Miranda warning card was in fact a declaration that he would not waive the rights contained in the warning, does such declaration invalidate a subsequent waiver. We think not. A valid waiver of the rights contained in the Miranda warning may be either expressed or implied.

The defendant's answers to questions put to him after repeated Miranda warnings may be sufficient to imply a waiver of the "Miranda rights" notwithstanding his refusal or failure to sign a "waiver" portion of a Miranda card and in the absence of an express declaration of waiver. In determining whether to so imply a waiver, the court may consider the surrounding circumstances. In the instant case, we find that Black's decision to respond affirmatively to Lt. Hriesk's initial suggestion that he "clear up matters" and the recently completed confrontation with Eatmon are sufficient surrounding circumstances to justify a trial court's finding of waiver at that crucial point.

Counsel for the appellant also contends that the request by Black, admitted by the state, to confer with attorney Davis made after the incarceration beginning February 11th commenced, was sufficient to negate any apparent subsequent waiver. We do not agree.

After his request at the second questioning on February 11, 1974, Black was given the opportunity to call his lawyer. Black's action, in subsequently deciding to answer the police officer's questioning after still another Miranda warning repeating his right ot counsel, constituted affirmative action by Black, which under the circumstances, we equate with waiver of the right to counsel. See *U.S. v. Coleman, 322 Fed. Sup. 550; Rouse v. State, 255 Ind. 670.*

Finally, in connection with the written confession taken on February 13, 1974, it is apparent that Black executed an express waiver of his Miranda rights by the manner in which he signed the waiver card and initialed the same and then proceeded with the execution of the confession and signed the same with both confessions containing an express waiver of his Miranda rights.

In conclusion, we find that the trial court's conclusion that the Miranda rule was complied with is fully supported by our review of the record.

THE ISSUE OF VOLUNTARINESS

It is fundamental that a challenge to the admissibility of a confession on the claim that was given under circumstances that render it involuntary must be resolved by the trial judge. See *Jackson v. Denno*, *11 Law Ed. 2d. 871, 376 U.S. 503; State v. Perry, 14 Ohio St. 2d. 256; State v. Wigglesworth, 18 Ohio St. 2d. 171.*

Frequently such a challenge is determined by the trial court only after he determines whom to believe when the testimony is contradictory. Contradictory testimony was offered on the subject of whether Black was fed following his February 11th incarceration and through the time of the February 13th written confessions. Denial of food for a

protected period would obviously render a confession involuntary. But the state offered testimony to rebut this claim and it supports the trial court's finding of voluntariness, assuming as we must, that the trial court believed the testimony offered by the state.

We find no authority for the proposition that the denial of the change of clothing is of such magnitude as to render a confession involuntary.

The defendant's claim that he had only eight hours of sleep on the evenings of February 11 and 12, was counterbalanced by the testimony of the officers that Black looked normal during the questioning. Lt. Hriesk's testimony indicated that Black's father, sister, girlfriend and Reverend Griffiths each saw the defendant shortly after he signed the February 13th damaging statement. However, no testimony was offered by any of those four persons to support Black's allegation of exhaustion due to the lack of sleep. The trial court's rejection of the loss of sleep claim on the issue of voluntariness, is supported by the record.

Remaining however, is the question of whether the admitted repeated questioning of Black which led to the first oral admissions and subsequently the written confession, demonstrates, as a matter of law, an involuntary confession.

Persistent questioning can, under certain circumstances, render a confession involuntary. See *Culombe v. Connecticut, 367 U.S. 568, 6 L. Ed. 2d. 1037.* However, we do not find the questioning sessions conceded by the state to have taken place to be of such a nature and number as to rule the subsequent oral admissions and written confessions involuntary. Further, the chronological analysis of the various interrogation sessions and confrontations with Jimmie Eatmon presents persuasive evidence for the proposition that the oral admissions and subsequent written confessions were prompted, not by repeated questioning leading to a destruction of Black's will and control, but by the first Eatmon confrontation. The defendant had steadfastly denied any involvement or knowledge of both slayings on the 22nd of January, the 28th of January and during the two sessions on the 11th of February and the first question session on the morning of the 12th of February. It was only after the first Black-Eatmon confrontation in which Eatmon indicated to Black, notwithstanding their friendship, that he was co-operating with the police and would testify, that the defendant made his first oral admissions. Those admissions followed promptly on the heels of the confrontation and induced an

incrimination by Black of Eatmon. That proposition is further supported by the nature of the second confrontation shortly after the first admissions were made by Black when Black further attempted to incriminate Eatmon as a guilty co-participant in the two crimes.

In conclusion, we find that the evidence presented at the lengthly suppression hearing supports the trial court's conclusion that Black's oral admissions and written confessions were the product of Black's free choice and thus voluntary and admissible. The 13th assignment of error is overruled.

II.

THE CONSTITUTIONAL CHALLENGE TO THE OHIO DEATH PENALTY

In 1972, the United States Supreme Court in *Furman v. Georgia, 408 U.S. 238,* by a five to four vote, reversed three convictions holding that the death penalty, as applied, constituted cruel and unusual punishment. Each of the nine justices wrote an opinion explaining his position and vote. Two of the five majority justices, Justice Stewart and Justice White indicated that more precise legislative pronouncements on the application and use of the death penalty freeing the imposition of the penalty from a totally discretionary application as existed in the cases decided by *Furman, supra,* would not run contrary to the cruel and unusual punishment restriction imposed by the eighth amendment to the United States Constitution.

The Ohio Legislature then enacted a new death penalty providing for a mandatory death penalty for seven types of aggravated murder, subject only to a subsequent judicial finding of a legislatively specified mitigating circumstance.

For the penalty to be death in Ohio, the trier of fact, be it a jury or a panel of judges, must find proof of the allegation of aggravated murder beyond a reasonable doubt and in addition the jury must separately find that one or more alleged specifications to have been proven beyond a reasonable doubt. Stated otherwise, the mere allegation that the defendant committed aggravated murder without an attending allegation of an aggravating circumstance does not constitute an indictment charging capital murder. It is only where the indictment separately alleges an aggravated circumstance that the potential penalty is death. Where the jury returns a verdict of aggravated murder, and also finds, as alleged in the indictment, proof of an aggravating circumstance as is the case here, then the responsibility for proceeding with the case shifts to the trial judge or in the case of a trial to three judges, to the three judges. The trial judge is then required to conduct a post conviction hearing at which time the court receives reports and hears evidence to determine whether or not the proof of any one of the three specified

mitigating circumstances[3] is established by a preponderance of evidence. The legislature has directed the trial court that if he finds proof of any one of the three mitigating circumstances, then it is his obligation, notwithstanding the conviction and the jury determination that an aggravating circumstance applied to the homicide, to impose upon the defendant a punishment of life imprisonment. On the other hand, if the court finds a failure to prove any one of the three mitigating circumstances, then the legislature has imposed upon the trial court the mandatory duty of sentencing the defendant to death.

3. 'R.C. 2929.04.

(B) Regardless of whether one or more of the agravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is sufficient to establish the defense of insanity."

In analyzing the legislation adopted in Ohio to restore capital punishment in the aftermath of *Furman v. Georgia*, *supra*, we first conclude that the fabric and design of the Ohio capital punishment provisions strictly limits the situations where capital punishment is a potential sentence by adding the aggravating circumstance factor. The legislature has further restricted the imposition of capital punishment to only those instances where a mitigating circumstance is not proven in the subsequent judicial proceeding conducted in the absence of the inhibitions previously imposed in Ohio in capital cases by the simultaneous guilt-punishment determination. We find that the imposition of the death penalty pursuant to the Ohio legislative mandate does not constitute cruel and unusual punishment.

We further find that the Ohio legislation meets the objection raised to previous capital punishment legislation by Justices White and Stewart of the United States Supreme Court. Assuming no change in the judicial philosophy of Justices White, Stewart, Burger, Powell, Rehnquist, and Blackmun, all members of the present United States Supreme Court, we find that the recent Ohio legislation enacting the death penalty to be constitutional in the context of the previously announced opinions of the majority of the members of the present United States Supreme Court. Thus the assignments of error numbers eleven and twelve, alleging the unconstitutionality of the capital punishment provisions in the Ohio legislation are overruled.

III.

THE CHALLENGED SENTENCING STATUTE, R.C. 2929.04(B)(3).

The tenth assignment of error claims that the third

"mitigating circumstance, available upon proof to the defendant to avoid the death penalty, is vague and ambiguous. We find no such vagueness and ambiguity. The fact that under normal circumstances it would be difficult for an offender to prove that his act of killing another human being was primarily the product of his own psychosis or mental deficiency does not result in a "vague and ambiguous" declaration. The tenth assignment of error is overruled.

IV.

CONDUCT OF THE MITIGATION HEARING.

Following the jury conviction in May, 1974, the trial court ordered a pre-sentence investigation and a psychiatric examination pursuant to R.C. 2929.03(D). On July 8, 1974, the post-trial pre-sentence mitigation hearing mandated by R.C. 2929.03(D) was held. The trial court advised counsel that the appointed psychiatrist Dr. Massie and the psychologist who had assisted the psychiatrist were available for "cross-examination". The defense counsel advised the court that he had received, reviewed and studied the pre-sentence report and also received, reviewed and studied the report of Dr. Massie, the psychiatrist, as to the examination of the defendant. Defense counsel indicated that he wished to have each of the doctors available so that he might examine them under oath. Then a brief discussion took place between the court and counsel as to the procedure to follow at the mitigation hearing. After the court expressed his views, counsel for the defendant stated that he was "in accord with the court's stated position, that

is as of status quo at this moment that the death penalty would be imposed and the burden to go further would fall upon the defendant". Having so stated, the counsel for the defendant indicated that he wished to examine first the psychiatrist and second the psychologist and then make a judgment whether to produce evidence. With that Dr. Massie, the psychiatrist, was called to the stand and was questioned extensively by the counsel for the defendant. Then the prosecutor cross-examined the doctor. At the conclusion of Dr. Massie's testimony, defense counsel indicated that it was no longer necessary to call the psychologist because Dr. Massie had produced and explained the report of the psychologist.

The defendant was given the opportunity to testify either under oath or to make a statement not under oath and he declined. No further evidence was offered or presented. The court then made the finding that none of the three mitigating circumstances had been established by a preponderance of the evidence.

The testimony offered by Dr. Massie including the psychologist's reports indicated that Dr. Massie had interviewed the defendant on three occasions and had taken his history and had examined him rather closely as to his background. The psychologist's report stated that the testing results indicated that the defendant was borderline mentally

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deficient. The psychiatrist, despite the urging of the defense counsel, did not state that the defendant's conduct was primarily the product of mental deficiency or psychosis in the context of the third mitigating circumstance. The psychiatrist did testify that he would agree that the mental deficiency of the offender was a factor in the offense.

The appellant assigns six separate assignments of error challenging the conduct of the mitigating hearing. First, by assignment of error number three, the appellant claims that the trial court should have conducted the questioning of the psychiatrist. In support of this contention, the appellant has attached a transcript of the mitigation hearing conducted by the Hon. George J. McMonagle, the Cuyahoga County Common Pleas Court in *State of Ohio v. Davis, Cuyahoga Case No. CR 13356*, where Judge McMonagle conducted the questioning of the psychiatrist and then provided the opportunity to counsel for the state and the defendant to cross-examine. We do not consider whether Judge McMonagle's method of handling the mitigation hearing was according to law, but we do find that the manner by which Judge Larson proceeded was in accordance with law. We find no requirement in the statute that the trial court in the mitigation hearing has the primary duty to question the witnesses who appear on the issue of whether or not a mitigating circumstance exists.

We hold the contention that the mandatory obligation of the trial court to hold the mitigation hearing should be construed as requiring the trial court to initiate the questioning process of the psychiatrist to be without merit.

The fourth assignment of error centers on the following question and answer in Dr. Massie's testimony:

> "Q. Were you able to form an opinion as to whether his involvement, whatever it may be, was primarily the product of such mental deficiency?
>
> A. No. sir. I was not able to."

Appellant contends that more questioning should have followed to determine why the psychiatrist was "not able to". We disagree. We construe the psychiatrist's answer to the question to be simply that he was not prepared to nor would he testify that the offender's action was "primarily" the product of the mental deficiency.

The fifth assignment of error claims that the psychiatrist should have had available to him the pre-sentence report required by R.C. 2929.03(D). We find no such requirement nor do we find any error in the psychiatrist not having the pre-sentence report. The psychiatrist testified that he carefully examined the appellant to determine his background, history and nature.

The sixth assignment of error claims that the psychiatrist paid no heed to the history, character, and condition of the defendant. We find no support for such allegation having

reviewed the psychiatrist's testimony.

The seventh assignment of error claims that the court erred in not calling the psychologist to the stand. The psychologist was called upon by the psychiatrist to aid him in his report. The report of the psychologist was throughly explained by the psychiatrist and not challenged and was apparently acceptable. We find no error in the court not insisting upon the psychologist being called to the stand. Counsel for the defendant specifically indicated that he no longer believed it necessary to call the psychologist to the stand. To now challenge the failure of the psychologist to be called to the stand as an error on the part of the court is not well taken.

The ninth assignment of error claims that the court failed to take into consideration the first and second mitigating circumstances in deciding that no mitigating circumstances had been established. We find no such error. The trial court heard testimony presented to the jury. None of the testimony presented to the jury remotely suggested that either the first or second mitigating circumstances had been obtained. The defendant offered no testimony to suggest either the first or second mitigating circumstance obtained. The evidence presented was designed to come within the third mitigating circumstance. Finally, the court did make an express finding that none of the three mitigating circumstances had been established as to either of the two homicides.

For the foregoing reasons, the third, fourth, fifth, sixth, seventh, and ninth assignments of error are overruled.

V.

THE CLAIM OF DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL.

The appellant claims that his selected counsel at the trial level denied him effective assistance of counsel. We commence our review of this claim by noting that the defendant's trial counsel, in addition to attending all hearings and continually engaging in extensive cross-examinations, filed the following motions and requests:

1. April 3, 1974, a demand for discovery;
2. April 3, 1974, a Criminal Rule D(2) request for notice from the prosecuting attorney of his intention to use specified evidence;
3. April 4, 1974, a request for a Bill of Particulars with ten sections;
4. April 4, 1974, a motion for an order to establish bail;
5. April 5, 1974, a motion to compel discovery;
6. April 19, 1974, a motion to suppress the statement of the defendant;
7. April 22, 1974, a notice of intention to seek a change of venue;
8. April 22, 1974, a notice of alibi;
9. May 13, 1974, a motion for specific instructions to the jury; and,

10. May 28, 1974, a motion for new trial based on ten grounds.

Notwithstanding, the above indicia of effective assistance of counsel, the appellant claims that the defense failed to prove effective assistance of counsel by:

1. A failure to challenge the constitutionality of the Ohio death penalty statute;
2. His performance at the mitigation hearing where he failed to call a second psychiatrist for the purpose of eliciting a contrary opinion to the one expressed by Dr. Massie;
3. His failure to call the psychologist, Dr. Grafe; and,
4. His drinking during the trial as demonstrated by affidavits attached to appellant's brief and signed by the appellant's father and sister.

We disregard the affidavits concerning the issue of drinking. Our review of the claim of the denial of ineffective counsel is limited to the record before us. The affidavits submitted in the appellant's brief do not constitute a part of the record before us for our review.

Turning to the claim that the defendant was denied effective assistance of counsel because counsel did not raise the constitutionality of the new Ohio death penalty, we find that such a failure does not, in and of itself, constitute denial of effective assistance of counsel. While it is conceivable that a common pleas court judge would declare the new Ohio

statute unconstitutional as it pertains to the death penalty, it is extremely unlikely. The greater likelihood is that the issue of the constitutionality of the new Ohio death penalty statute will be resolved by The Ohio Supreme Court or the United States Supreme Court. It is apparent from the lengthy suppression hearing, for which the transcript of proceedings numbers approximately 150 pages, that the primary strategy of defendant's trial counsel was to attempt to suppress the defendant's lengthy confessions and then hope to free the defendant on the basis that the defendant's girlfriend and other friends could not be believed as to the defendant's oral admissions of guilt respecting the slayings of Olga Ladderman and Robert Staples.

To argue that counsel for the defendant should have centered his attention on the constitutionality of the Ohio death penalty statute, constitutes an exercise in second guessing but fails to establish the denial of effective assistance of counsel. If this court were to hold that defendant, after selecting his own counsel, can gain a new trial by demonstrating that his own selected counsel denied him effective assistance of counsel by failing to attack the constitutionality of the statute under which is is being tried, then the state is powerless to proceed with effective prosecution.

Additionally, we find that the appellant's claim that the trial counsel should have called a second psychiatrist to testify and that the trial counsel should have called the psychologist to testify, notwithstanding his determination as an advocate that Dr. Massie, the psychiatrist, had produced and explained the test results of the psychologist, fails to establish a denial of the ineffective assistance of counsel.

An adverse result to the defendant is not to be equated with a denial of effective assistance of counsel. In reviewing the allegations claiming a denial of effective assistance of counsel, we conclude that the appellant has so equated a conviction and death penalty. The first, second and eighth assignments of error are overruled.

In conclusion we find from a review of this record, that the defendant has been convicted of two robbery-killings committed within hours of each other under circumstances which indicate that he engaged in both advance planning and subsequent conduct designed to conceal his responsibility for those reprehensible crimes. We find that the conviction and subsequent sentence are consistent with the Ohio Laws which we find to be constitutional and in comformance with due process. The judgment and sentence of the Richland County Common Pleas Court of Mansfield, Ohio, is affirmed.

Rutherford, P.J. and Putman, J., concur.

Note: Page 42 a through 45a of this Appendix were not of reproducible quality. They are the Opinion of the Court in Ohio v Black, 48 Ohio St.2d 262.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 77 TERM

To wit: January 14, 1977

State of Ohio,
Appellee,

vs.

Jesse Black,
Appellant.

No. 76-219

REHEARING

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this.....day of..... 19.....

.....Clerk.

By.....Deputy.

THE STATE OF OHIO,
City of Columbus.

*19*77 *TERM*

State of Ohio,
Appellee,

To wit: January 21, 1977

No. 76-219

vs.

Jesse Black,
Appellant.

E N T R Y

(RICHLAND COUNTY)

Upon consideration of the motion, filed by counsel for appellant, to stay execution of sentence pending the timely filing of an appeal to the Supreme Court of the United States, it is therefore

ORDERED that execution of sentence be, and the same hereby is, stayed, pending the timely filing of an appeal to the Supreme Court of the United States.

It is further ORDERED that if a timely notice of appeal is filed to the Supreme Court of the United States, this stay will automatically continue pending final determination of the appeal by that Court.

It is further ORDERED that the Clerk of this Court shall forthwith send a certified copy of this Stay of Execution to the Superintendent of the Southern Ohio Correctional Facility, who shall acknowledge receipt thereof.

C. William O'Neil

CHIEF JUSTICE

I, THOMAS L. STARTZMAN, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No.....Page.....

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 21st *day of* January *19*77

THOMAS L. STARTZMAN *Clerk.*

By .....*Deputy.*

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OHIO STATUTORY PROVISION

(1) Ohio Revised Code, Section 2903.01 Aggravated Murder.

(A) No person shall purposely, and with prior calculation and design, cause the death of another.
(b) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.
(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(2) Ohio Revised Code, Section 2903.02 Murder.

(A) No person shall purposely cause the death of another.
(B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

(3) Ohio Revised Code, Section 2903.03 Voluntary Manslaughter.

(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.
(B) Whoever vioaltes this section is guilty of voluntary manslaughter, a felony of the first degree.

(4) Ohio Revised Code, Section 2903.04 Involuntary Manslaughter.

(A) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a felony.
(B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.
(C) Whoever violates this section is guilty of involuntary manslaughter. Violation of division (A) of this section is a felony of the first degree. Violation of division (B) of this section is a felony of the third degree.

(5) Ohio Revised Code, Section 2923.03 Complicity.

(A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
(1) Solicit or procure another to commit the offense;

(2) Aid or abet another in committing the offense;
(3) Conspire with another to commit the offense in violation of section 2923.01 of the Revised Code;
(4) Cause an innocent or irresponsible person to commit the offense.
(B) It is no defense to a charge under this section that no person with whom the accused was in complicity has been convicted as a principal offender.
(C) No person shall be convicted of complicity under this section unless an offense is actually committed, but a person may be convicted of complicity in an attempt to commit an offense in violation of section 2923.02 of the Revised Code.
(D) No person shall be convicted of complicity under this section solely upon the testimony of an accomplice, unsupported by other evidence.
(E) It is an affirmative defense to a charge under this section that, prior to the commission of or attempt to commit the offense, the actor terminated his complicity, under circumstances manifesting a complete and voluntary renunciation of his criminal purpose.
(F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender. A charge of complicity may be stated in terms of this section, or in terms of the principal offense.

(6) Ohio Revised Code, Section 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.
(B) Whoever is convicted of or pleads guilty to murder in violation of section 2903.02 of the Revised Code shall be imprisoned for an indefinite term of fifteen years to life. In addition, the offender may be fined an amount fixed by the court, but not more than fifteen thousand dollars.
(C) The court shall not impose a fine in addition to imprisonment or death for aggravated murder, or in addition to imprisonment for murder, unless the offense was committed with purpose to establish, maintain, or facilitate an activity of, a criminal syndicate as defined in section 2923.04 of the Revised Code, or was committed for hire or for purpose of gain.
(D) The court shall not impose a fine or fines for aggravated murder or murder which, in the aggregate and to the extent not suspended by the court, exceeds the amount which the offender is or will be able to pay by the method and within the time allowed without undue hardship to himself or his

dependents, or will prevent him from making reparation for the victim's wrongful death.

(7) Ohio Revised Code, Section 2929.03 Imposing Sentence for A Capital Offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.
(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.
(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:
(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury;
(2) By the trial judge, if the offender was tried by jury.
(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender.
shall impose sentence of death

(8) Ohio Revised Code, Section 2929.04 Criteria for Imposing Death or Imprisonment for a Capital Offense.

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election acoording to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death

penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence: (1) The victim of the offense induced or facilitated it.
(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Supreme Court, U. S.
FILED
MAY 21 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-6547

JESSE BLACK, Petitioner

-vs-

STATE OF OHIO, Respondent

RESPONDENT'S BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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STATEMENT OF THE CASE

Respondent accepts the broad outline of the case as stated by petitioner but believes there are several areas in which the record does not support his statement of the facts involved in this case.

First, the statement that petitioner is mentally retarded does not appear in the record. The psychiatrist, Dr. Massie, testified that he was "mildly mentally deficient," Mit. Transcript, p. 34, and within the range of borderline mental retardation, Mit. Transcript, p. 24, which is significantly different.

Secondly, while the Mansfield Municipal Court had actually set aside the bench warrant upon which petitioner was arrested on February 11, 1974, the warrant to serve had not been recalled nor had the fact of its cancellation been communicated to the Mansfield Police Department. Thus, the arrest under it was valid. Moreover, incidental to this arrest, petitioner was found to have marijuana in his possession and was charged and held on that offense.

With respect to the various interviews of petitioner by the Mansfield Police Department, the record shows that before each conversation petitioner was advised of his rights in accordance with Miranda v. Arizona. While petitioner always refused to sign the rights card, he indicated he understood his rights on each occasion before he was interviewed. Further, while there is testimony by Ptl. Butler to the affect that petitioner asked to speak to his attorney before he made incriminating statements on February 11, Motion to Suppress, p. 35, this testimony is contradicted by Lt. Hriesik, Motion to Suppress, p. 30, who testified that petitioner did not ask to speak to his attorney.

It is suggested that petitioner's trial counsel offered petitioner's criminal record into evidence and thus prejudiced him before the jury. In reality, the discussion of petitioner's prior felony conviction took place out of the presence of the

jury. This was done by petitioner's trial counsel so that a determination could be made before the trial judge that petitioner's decision not to testify was completely voluntary. As the jury had been excused before this occurred, it could have in no manner affected their verdict, Transcript, p. 574.

At a number of points, petitioner's trial counsel is referred to as appointed. In fact, he was privately retained and paid by petitioner.

While petitioner's trial counsel admitted in closing argument that his client was involved in these crimes, this sort of an argument must be read in context. The evidence of petitioner's guilt was overwhelming at this point, and it is nothing more than good trial strategy to admit some involvement while attempting to avoid the element of intent so as to reduce the charge to a lesser offense than aggravated murder.

Finally, at the mitigation hearing, Dr. Massie, the psychiatrist appointed to examine petitioner, testified that while petitioner was borderline mentally retarded, neither armed robbery nor murder is a product of mental retardation, Mit. Transcript, p. 41.

A. UNDER ANY STANDARD FOR DETERMINING THE EFFECTIVE ASSISTANCE OF COUNSEL, THE RECORD SHOWS PETITIONER WAS EFFECTIVELY ASSISTED IN HIS DEFENSE BY RETAINED TRIAL COUNSEL WHO FILED NUMEROUS MOTIONS ON HIS BEHALF, PRESENTED DEFENSE WITNESSES AND CROSS-EXAMINED STATE WITNESSES IN SUCH A MANNER AS TO PERMIT HIS CLIENT TO HAVE THE BENEFIT OF EVERY RIGHT AND DEFENSE ENTITLED TO HIM UNDER THE CONSTITUTION OF THE UNITED STATES.

Respondent agrees that no test to determine the effective assistance of counsel has yet been adopted by this Court. Whatever the test, however, effective assistance of counsel is and must remain a question of fact. Petitioner lists seven separate examples of incompetency of trial counsel which respondent believes are either not supported by the record or show nothing more than tactics which petitioner's present counsel does not approve. First, it is alleged that petitioner's trial counsel, who petitioner privately retained, admitted that petitioner was guilty in both his opening statement and his closing argument.

Petitioner's current counsel has either misread the record or is intentionally trying to mislead this Court. With respect to the opening statement, petitioner's trial counsel stated as follows: (Transcript, page 8)

> "I further expect the evidence to show ultimately that Mr. Black was not engaged in the holdup or robbery of Mr. Staples at the beer dock; that he was not present when the person who did that shooting there and that he was not involved in that event directly either. Rather what I am suggesting to you is this. I fully and sincerely believe the evidence will reveal some complicity of criminal conduct or knowledge on the part of Jesse Black whether or not he testifies but that he is definitely not guilty of the aggravated murder of Olga Laderman and that he is not guilty of the aggravated murder of Robert Staples and feel when the evidence is in and in closing argument I will certainly suggest to you at that time what I believe the evidence has shown if it has shown some criminal conduct on the part of Mr. Black we will certainly admit that. I believe I will be able to state here in all sincerity and honesty and suggest to you no aggravated murder was committed by this man on January 21st of this year or any other time in his life."

Certainly by no stretch of the imagination is this an admission of petitioner's guilt to the jury.

With respect to the closing argument, petitioner's trial counsel stated in an attempt to explain some damaging evidence admitted against his client: (Transcript, page 617)

> "Basically what he tells you about the Olga Lederman death and he tells that in the alleged oral statement he made prior to the written statement is that he was about to leave that motel and she grabbed for the gun and it went off, it was an accident. All right it was an accident. There was no intent. He didn't want to shoot that woman. He didn't want to kill anybody."

Further, at pages 619-620 of the Transcript, petitioner's trial counsel argued as follows:

> "What I am suggesting to you basically is this. Jesse had some involvement in these things if nothing else. It is his gun and he was in the car but he had no involvement other than that. He had no involvement in both of them than that and he probably is an accomplice or whatever you want to call it. I am further suggesting to you that this man's statement and this type of evidence and on this evidence and in the absence of anybody else being in any way charged or implicated, although the information is abundant, that he should not be found guilty of aggravated murder."

This is a capital case. With the overwhelming evidence before the jury at this time pointing to the petitioner's guilt, it was nothing more than good trial strategy to admit some involvement by petitioner but attempt to avoid the element of intent which would have made the verdict one of guilty of aggravated murder. This is nothing more than good tactics and hardly an indication of incompetency when arguing to a jury.

Secondly, petitioner states that trial counsel unjustifiably introduced evidence to the jury of petitioner's felony convictions citing Transcript, page 577, and Mitigation, page 32. Again, petitioner has misread the record. The Transcript clearly shows that the jury was excused, Transcript, page 574, and the admission of the petitioner's criminal record was done out of their presence. This procedure was followed so that it would be clear that petitioner's decision not to testify was totally voluntary. Petitioner's trial counsel asked him a number of questions in front of the trial judge. Petitioner's criminal record was mentioned at this point, but since the jury was not present, it could hardly have influenced them.

With respect to its introduction at the mitigation proceedings, this occurred after guilt had been determined and in a proceedings before the trial judge. Obviously, this could not have influenced the jury adversely as they had completed their

function and were not present at this point.

Thirdly, it is incredibly suggested by the petitioner the trial counsel did not attempt to suppress petitioner's statements to the police, which took place after petitioner was arrested on a bench warrant which had, in fact, been set aside by an earlier court appearance. This argument ignores the fact that the warrant was never in fact recalled and thus the arrest under it was valid. Of greater importance was the fact that petitioner's trial counsel filed a motion to suppress all statements which was the subject of the lengthy pre-trial hearing. The motion was overruled and that decision was affirmed by the Court of Appeals and the Ohio Supreme Court. Thus, contrary to petitioner's allegation, trial counsel did raise this objection in the trial court in an effective manner.

Petitioner's fourth allegation of incompetency is difficult to understand. The state admitted in opening statement (Transcript, page 5) that the murder weapon was never located. The fact, therefore, that a witness testified that it had been destroyed does not seem to add much to the case that the jury did not earlier know. With respect to the suggestion that the Chief of Police was permitted to give his opinion as to the petitioner's guilt, the jury would hardly expect less from him. Certainly in the context in which this statement was made it had little influence.

Fifthly, it is suggested that petitioner's trial counsel brought out on cross-examination prejudicial evidence. It is apparent from reading the record that petitioner's trial counsel was searching for inconsistencies in the witnesses' testimony and probably trying to confuse the jury by stressing various minor points. While it may not have been particularly successful, it is hardly an indication of incompetence. Moreover, nothing elucidated by petitioner's trial counsel is of any significance in the total context of the trial.

Sixthly, petitioner's suggestion that trial counsel failed to employ an independent psychiatrist to examine petitioner

seems based on hindsight. Certainly the psychiatrist appointed by the court was not a prosecution witness. Petitioner presumes that a psychiatrist who would testify favorably to petitioner was available. It is at least as likely that another psychiatrist might have been less favorable to petitioner's position. Such speculative second-guessing does not show incompetence.

Finally, it is alleged that petitioner's trial counsel was not familiar with the various aspects of criminal procedure. In response to this charge perhaps it is more useful to look at what he did rather than what it is alleged he failed to do. He appeared with defendant at arraignment and at preliminary hearing in Municipal Court, filed a Demand for Discovery, filed a Request for Notice from the Prosecuting Attorney to use specific evidence, filed a Request for Bill of Particulars, filed a Motion to Suppress defendant's statements, filed a Motion for Bail, filed a Motion for Change of Venue, filed a Notice of Alibi, filed a Motion to Challenge the Jury Array, filed a Motion for Specific Instructions to the Jury, and a Motion for a New Trial. In addition, he participated at a pre-trial motion, a lengthy trial and mitigation proceeding producing over 1100 pages in transcript, he called eight defense witnesses and cross-examined twenty-nine state witnesses.

Respondent has no quarrel with the proposition that the petitioner is entitled to competent counsel, but competent defense does not mean successful defense or flawless defense or a defense which the hindsight of petitioner's present counsel would have conducted. By any of the tests for the competency of counsel which have been proposed, it is clear from the record that petitioner was ably defended by competent, privately-retained trial counsel. By any test this Court may choose to apply, the record does not support petitioner's claim that his trial counsel's incompetence denied him the effective assistance of counsel which the Sixth Amendment guarantees.

B. OHIO REVISED CODE SECTIONS 2929.03 (E) AND 2929.04 (B) PROVIDE A CONSTITUTIONALLY PERMITTED SYSTEM TO DETERMINE THE EXISTENCE OF MITIGATING FACTORS AT THE SENTENCING STAGE OF A CAPITAL CASE AFTER THE DEFENDANT'S GUILT AND THE PRESENCE OF AGGRAVATING CIRCUMSTANCES HAVE BEEN PROVEN BEYOND A REASONABLE DOUBT.

The Ohio procedure for imposing the death penalty places the burden of proof upon the state to prove both the defendant's guilt of each and every element of the crime of aggravated murder and, in addition, the presence of certain specific aggravating circumstances. Both must be proven beyond a reasonable doubt. The question of whether there are mitigating circumstances remains separate and apart from guilt or innocence. The Ohio system for imposing the death penalty, then, involves two distinct stages. After the jury has found the defendant guilty of aggravated murder and of a specified aggravating circumstance, it becomes the function of the trial judge to determine the sentence based upon whether or not there are any mitigating circumstances.

This system is totally different from procedures found impermissible by this Court in Mullaney v. Wilbur, 421 U.S. 684 (1975) and In re Winship, 397 U.S. 358 (1970) where the burden of proof on a material issue concerning the question of guilt or innocence was placed upon the defendant. Under the Ohio procedure, the state must prove not only each and every element of the offense beyond reasonable doubt, but also each and every element of aggravation by this same standard. Section 2929.04 (B) of the Ohio Revised Code then comes into affect. It provides:

> "(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:
> (1) The victim of the offense induced or facilitated it."
> "(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."
> "(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Petitioner presumes that this statute places the burden of proof upon the defendant. While, of course, it is in his interest to show mitigating circumstances exist, the statute does not place any burden on the defendant. The existence of mitigating circumstances is determined in a hearing before the trial judge after the defendant's guilt and the presence of aggravating circumstances have already been determined. A psychiatric report and pre-sentence study are required and these documents alone might be sufficient to show the existence of mitigation. The burden thus is as much upon the state to refute the existence of mitigating factors as it is upon the defendant to establish them. Unlike the statutes found unconstitutional in Mullaney and Winship, Ohio Section 2929.04 (B), Revised Code, does not place the burden of proof on the defendant on the critical issues of guilt or innocence or even the presence of aggravating circumstances. These must be proven by the state beyond a reasonable doubt. The existence of mitigation on the other hand, or its absence, can be proven by a preponderance of the evidence with both sides being free to submit evidence on this issue. As the defendant at this point has already been convicted, there is no longer a problem of self-incrimination and he may, therefore, testify freely.

Even if Section 2929.04 (B) can be read to place the burden of proof in the mitigation proceedings on this defendant, this is not constitutionally impermissible. This Court has approved, for example, the placing of the burden of proof upon the defendant in a criminal case on the issue of sanity. Leland v. Oregon, 343 U.S. 790 (1952). Under the Ohio procedure, the defendant's guilt has already been established, along with aggravating circumstances. Nothing in the Constitution prohibits placing upon the defendant a duty to show why leniency should be granted at the sentencing stage of the trial. As the Ohio Supreme Court noted in State v. Woods, 48 O. St. 2d 127, 137 (1976):

> "The question at that stage is not guilt, for guilt has already been determined. Nor is it primarily whether the standards of conduct imposed by the criminal law have been upheld in order to express society's disapproval

of the criminal act and to deter others, for those goals too are largely accomplished by the verdict. Rather, the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime."

Therefore, Section 2929.04 (B), Revised Code of Ohio, does not place upon the defendant any burden of proof with respect to guilt or innocence. Rather, it provides for a method to allow the trial judge to make the broadest possible inquiry on the issue of the existence of factors which mitigate against the death penalty in every case.

C. THE PROCEDURE FOR THE IMPOSITION OF THE DEATH PENALTY IN OHIO WHERE AFTER THE DEFENDANT HAS BEEN FOUND GUILTY OF AGGRAVATED MURDER BEYOND A REASONABLE DOUBT, AND, IN ADDITION, HAS BEEN FOUND GUILTY BEYOND A REASONABLE DOUBT OF A SPECIFIC AGGRAVATING CIRCUMSTANCE, THE TRIAL JUDGE CONSIDERS WHETHER THERE ARE ANY MITIGATING FACTORS WHICH PRECLUDE THE DEATH PENALTY IS CONSTITUTIONALLY PERMISSIBLE UNDER PROFFITT V. FLORIDA, 96 S. Ct. 2960 (1976).

The death penalty may be imposed in Ohio only when a jury finds a defendant guilty of the crime of aggravated murder and, in addition, finds that one of seven specific aggravating circumstances stated in the indictment occurred. Both findings must be beyond a reasonable doubt. Section 2929.03 (B), Revised Code of Ohio. These specific aggravating circumstances are listed in Section 2929.04 (A), Ohio Revised Code:

"(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election."

"(2) The offense was committed for hire."

"(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender."

"(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code."

"(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender."

"(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer."

"(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary."

Where the jury finds the defendant guilty beyond a reasonable doubt, both of the offense of aggravated murder and at least one of the above specifications, then a separate hearing is held before the trial judge on the question of mitigation. Section 2929.03 (D), Ohio Revised Code, requires both a pre-sentence investigation and a psychiatric examination report, both of which are provided to the defendant and the prosecutor. Compare Gardner v. Florida, 97 S. Ct. 1197 (1977). A further hearing at which other evidence may be introduced and the pre-sentence report and psychiatric examination challenged or supported is also held. Section 2929.04 (B), Ohio Revised Code, provides the criteria which the trial judge is to consider in deciding whether or not to impose the death penalty:

"(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence (preponderance) of the evidence:

"(1) The victim of the offense induced or facilitated it."

"(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."

"(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

Regardless of the penalty imposed, the defendant then has the right to appeal to a Court of Appeals and thereafter, in those cases in which the death penalty is affirmed, has a further right of appeal to the Ohio Supreme Court. Ohio Constitution, Article IV, Section 2 (B)(2)(a)(ii).

As this Court stated in Proffitt v. Florida, 96 S. Ct. 2960 at 2966:

> "And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

Unlike the mandatory death penalty procedure found impermissible by this Court in Woodson v. North Carolina, 96 S. Ct. 2978 (1976) and Roberts v. Louisiana, 96 S. Ct. 3001 (1976), the Ohio procedure provides a system to guide and channel the trial court's decision and thus avoid the total arbitrariness and capriciousness found unconstitutional in Furman v. Georgia, 408 U.S. 313 (1972). The Ohio procedure requires the trial judge to focus on the individual defendant and his specific crime in accordance with a precise criteria. This procedure occurs only after a jury has not only found the defendant guilty of the crime of aggravated murder, but has, in addition, found him guilty of a separate aggravating specification. An Ohio Court of Appeals and the Ohio Supreme Court then reviewed each case to guarantee a uniform application of the mitigating factors. As the Ohio Supreme Court said in the first case it decided under this procedure: State v. Bayless, 48 O. St. 2d 73, 86 (1976)

> "In addition, this court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges."

Like Georgia, Texas and Florida, Ohio has enacted the statutory scheme in response to Furman v. Georgia which provides for an informed, focused, guiding and objective inquiry on the question of whether the death penalty should be imposed. While varying in detail from those procedures already found constitutionally permissible by this Court, it provides the same guarantees that the death penalty will not be imposed in Ohio in a wanton or freakish manner.

Petitioner attacks the mitigating factors found in Section 2929.04 (B), Ohio Revised Code, as either illusory or overly

narrow to be meaningful. However, this Court has never specified what mitigating factors must be considered and has even approved in Gregg v. Georgia, 96 S. Ct. 2909 (1976), a system which provides that a jury may consider in mitigation circumstances not provided by statute. As this Court stated in Jurek v. Texas, 96 S. Ct. 2950 at 2956:

> "Thus, in order to meet the requirement of the Eighth and Fourteenth Amendments, a capital-sentencing system must allow the sentencing authority to consider mitigating circumstances."

As with the Texas statute found constitutional in that case, the Ohio statute, Section 2929.04 (B), Ohio Revised Code, provides the trial judge with the guidance needed to determine the existence of mitigating circumstances and avoid the arbitrary and capricious application of the death penalty which the Eighth and Fourteenth Amendments to the United States Constitution prohibit.

D. THE STATEMENTS GIVEN TO THE POLICE BY PETITIONER WERE OBTAINED IN FULL COMPLIANCE WITH THIS COURT'S RULING IN MIRANDA V. ARIZONA AND SHOW A KNOWING AND INTELLIGENT WAIVER BY THE PETITIONER OF HIS RIGHT TO REMAIN SILENT.

The transcript of proceeding on defendant's motion to suppress shows that no violation of the defendant's rights as expressed by this Court in Miranda v. Arizona, 384 U.S. 436 (1966) occurred. It affirmatively establishes that defendant was advised of his rights numerous times by officers of the Mansfield Police Department, and that he voluntarily waived these rights and gave statements to the officers.

In the Miranda case, this Court said (at 444 U.S.):

> "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."

The Mansfield Police Department complied with this directive.

The questioning of the defendant took place during a three-day period. On February 11, 1974, at 10:25 a.m., the defendant was read his rights by Lieutenant Charles Hriesik (Motion to Suppress, p. 57). At 1:45 p.m. on the same day, Lieutenant Hriesik again read the defendant his rights (Motion to Suppress,

p. 62). The next day, February 12, 1974, Patrolman Marcus Butler read the defendant his rights at 8:15 a.m. (Motion to Suppress, p. 5). At 10:15 a.m. that day the defendant stated to Lieutenant Hriesik that he knew what his rights were (Motion to Suppress, p. 8). At 10:20 a.m. Patrolman Butler read the defendant his rights again. (Motion to Suppress, p. 10). Captain Robert E. Krauss of the Ontario Police Department testified that the defendant was read his rights yet another time on February 13, 1974, at 4:05 p.m. (Motion to Suppress, p. 76).

Thus, the evidence adduced by the State at the Motion to Suppress established that the defendant was read his rights prior to questioning at least five times. The court admitted into evidence (Motion to Suppress, p. 104) five rights cards produced by the State, all of which were read to the defendant. We submit that the State proved that the police department fully complied with the Miranda decision by repeatedly advising the defendant of his rights before asking the defendant any questions.

This Court in Miranda also recognized that an accused could waive his right to remain silent and proceed to give a statement. In this case the defendant did waive his rights after being carefully advised of them by the police officers.

In Michigan v. Mosley, 96 S. Ct. 321 (1975), this Court established a test to determine when incustodial interrogation may resume after an initial decision by a defendant to remain silent:

> "...the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his "right to cut off questioning" was "scrupulously honored."
>
> Mosley at page 326

Here, the petitioner's right to cut off questioning was carefully honored. When he indicated he no longer wished to be questioned, the questioning ceased. True, as in Mosley, it was resumed, but only after petitioner was once again

advised of his rights as specified in Miranda and indicated a willingness to answer questions. Petitioner's right to have the questioning terminated was scrupulously honored and his subsequent admissions are therefore not barred by the holding in Miranda as interpreted by this Court in Mosley.

The defendant first made an oral statement to the police at 10:15 a.m. on February 12th at which time he stated he knew what his rights were and that he had shot and robbed the lady in Ontario (Motion to Suppress, p. 9). Prior to that statement he had been read his rights at least three times. The defendant also stated that he would tell the police the whole story if he could first talk to his father and girlfriend, which he was allowed to do. (Motion to Suppress, p. 42).

The defendant was again read his rights, and shortly thereafter at 10:25 a.m. he told Major O'Neil that "I shot the lady in Ontario." (Motion to Suppress, p. 11). When confronted with Jimmie Eatmon, the defendant told him that he robbed and shot the lady at the motel (Motion to Suppress, p. 14). The defendant also told his father that he shot the lady (Motion to Suppress, p. 65). When the defendant gave a written statement on February 13, he waived his rights in writing (Motion to Suppress, p. 77), and the Appellant admits in his brief that this was a valid waiver.

The statements given by the defendant were not involuntary. The evidence showed that the defendant was treated quite well. Whenever he asked to call his attorney, he was permitted to do so. His physical condition at the various times he was questioned was good (Motion to Suppress, pp. 23, 58, 102, 111). The defendant was fully aware of his rights. The defendant was certainly not held incommunicado. When he could not reach his father by telephone, a cruiser was dispatched to bring his father in to talk to him. On several occasions, the defendant was allowed to see his father, his girlfriend, his sister, and Reverend Griffith. When he was being questioned, he was given

frequent breaks, food, and cigarettes. No psychological coercion was used against the defendant, and no promises were made to him. The statements made by the defendant were voluntary and the trial court properly admitted them into evidence.

Not surprisingly there were contradictions in the evidence as to the circumstances surrounding the defendant's statement to the members of the Mansfield Police Department, but the trial judge resolved these conflicts in favor of the admissibility of the defendant's statement. This determination is fully supported by the record.

Petitioner never indicated a desire not to be questioned unless his counsel could be present. He made no request that counsel be appointed. His conduct and his responses to questioning throughout the period demonstrated his belief that he was represented by counsel and his confidence that he knew his rights and was in control of the situation. Having been fully advised of his rights on numerous occasions, he voluntarily gave incriminating statements to the police. Based upon the total circumstances, it is clear that the admissions of the defendant were made only after full compliance with the rules laid down by this Court in Miranda v. Arizona and were properly admitted against petitioner at the trial.

CONCLUSION

It is respectfully submitted that petitioner was ably represented, fairly tried, and his guilt established beyond any reasonable doubt. His conviction has been reviewed and found valid by unanimous votes of both the Ohio Fifth District Court of Appeals and the Ohio Supreme Court. Petitioner was sentenced in accordance with a statutory system which meets the Constitutional guidelines laid down by this Court in Gregg, Proffitt and Jurek. As justice has therefore been

served, a petition for Writ of Certiorari need not be granted in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief Opposing Petition for Writ of Certiorari was served by regular United States mail this 20th day of May, 1977, upon Bruce R. Jacob, The Ohio State University College of Law, 1659 North High Street, Columbus, Ohio 43210.

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